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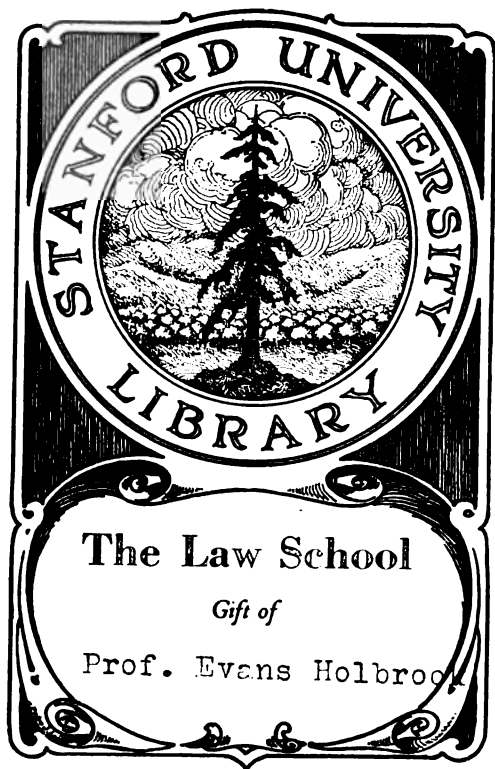
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THE  
**L A W**  
OF  
**PLEADING AND EVIDENCE**

IN  
**CIVIL ACTIONS,**  
ARRANGED ALPHABETICALLY:

WITH  
**Practical Forms:**  
AND THE  
**PLEADING AND EVIDENCE TO SUPPORT THEM.**

---

BY JOHN SIMCOE SAUNDERS, ESQ.  
BARRISTER AT LAW.

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SECOND AMERICAN EDITION, WITH CONSIDERABLE ADDITIONS,

BY A MEMBER OF THE PHILADELPHIA BAR.

VOLUME I.

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**Philadelphia:**  
**ROBERT H. SMALL, LAW BOOKSELLER, NINOR STREET.**

1831

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UNCLASSIFIED INFORMATION

## ADVERTISEMENT.

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THE object of the Author, in the following work, has been to collect and digest the Law relative to Pleading and Evidence into the smallest compass, and under the most convenient arrangement.

The work, consequently, not only contains the general principles of the Law respecting Pleading and Evidence, and the forms of Civil Actions, but also the form of the remedy, the pleadings, and the evidence necessary for the support of *every ground of action*; likewise, the pleading and evidence necessary to the support of *every defence*, with the Precedents of most common use in all these cases.

The contents of the work are alphabetically arranged, each title containing such portions of the Law of Pleading and Evidence as are peculiar to it;—this arrangement having been considered the most proper, to compress and simplify the work, as well as to render it more convenient for the purpose of reference.

The arrangement of each separate title is, as nearly as possible, uniformly the same; and, wherever subdivision is required, is explained by the list of contents at the head of each. Whenever the laws of pleading and evidence have been combined, the arrangement of the title is as follows:—As regards the plaintiff,—first, his remedy is described; then the law which governs the form of that remedy; next, the form itself; and, lastly, the evidence required to support that form. As regards the defendant, a similar course is pursued: instructions are first given as to the choice of his plea; next, as to the manner of framing it; and, lastly, the evidence required to support it.

The work, to those who are not familiar with such undertakings, will convey a very inadequate idea of the pains and time employed in composing it: they, however, who have experienced the trouble of such a task, will appreciate the difficulties attendant on it. The Author, therefore, hopes for their indulgence, if, in the multitude of points of which it treats, and of references which it contains, errors may have chanced to occur.

The Author has spared no labour to render the work of extensive practical utility, and has to acknowledge the kind assistance of some of his friends, whose knowledge and experience in the profession have materially aided him in completing it.

## ABBREVIATIONS.

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- Amb., Ambler's Reports.  
 And., Andrew's Reports.  
 Anstr., Anstruther's Reports.  
 Atk., Atkyns's Reports.  
 Bac. Ab., Bacon's Abridgment.  
 B. & A., Barnewall and Alderson's Reports.  
 B. & B., Broderip and Bingham's Reports.  
 B. & C., Barnewall and Cresswell's Reports.  
 Barnes, Barnes's Notes.  
 Bayl., Bayley on Bills.  
 Bla. R., Bl. R., Blackstone's Reports.  
 Bla. C., Blackstone's Commentaries.  
 B. N. P., Buller's Nisi Prius.  
 B. & P., Bosanquet and Puller's Reports.  
 Bing., Bingham's Reports.  
 B. C. C., Browne's Chancery Cases.  
 Bro. A., Brooke's Abridgment.  
 Buls., Bulstrode.  
 Borr., Burrow's Reports.  
 Camp., Campbell's Reports.  
 C. & P., Carrington and Payne's Reports.  
 Carth., Carthew's Reports.  
 C. T. Hard., Cases Temp. Hardwicke.  
 Ch. P., Pl., Chitty's Pleadings.  
 Ch. B., Chitty on Bills.  
 Ch. C. L., Chitty's Commercial Law.  
 Ch. Con., Ch. Jr. Con., Chitty's Contracts.  
 Ch. R., Chitty's Reports.  
 Co. R., Coke's Reports.  
 Com. D., Co. D., Comyn's Digest.  
 Com. R., Comyn's Reports.  
 Cowp., Cow., Cowper's Reports.  
 Cro. C., Croker's Reports, Charles.  
 Cro. J., do. James.  
 Cro. E., do. Elizabeth.  
 Doug., Douglas's Reports.  
 D. & R., Dowling and Ryland's Reports.  
 D. & R. C., Dowling and Ryland's Nisi Prius Cases.  
 Ea., E., East's Reports.  
 Esp., Es., Espinasse's Reports.  
 Esp. D., Espinasse's Digest.  
 Fitzg., Fitzgibbon's Reports.  
 F. N. B., Fitzherbert's Natura Brevium.  
 Fort., Fortesque.  
 Gilb. E., Gilb. Ev., Gilbert's Evidence.  
 Glan., Glanville's Reports.  
 G. & J., Glyn & Jamieson.  
 God., Godb., Godbolt's Reports.  
 H. Bl., Henry Blackstone's Reports.  
 Hard., Hardwicke's Reports.  
 Hob., Hobart's Reports.  
 Keb., Keble's Reports.  
 Leo., Leonard's Reports.  
 Lev., Levin's Reports.  
 Lutw., Lutwyche's Reports.  
 Madd., Maddox's Reports.  
 Marsh., Mars., Marshall's Reports.  
 M. & S., Maule & Selwyn's Reports.  
 M'C. & Y., M'Clelland and Young's Reports.  
 Mer., Merivale's Reports.  
 Mod. R., Modern Reports.  
 Moo. R., Moore's, J. B. Reports.  
 M. & P., Moore and Payne.  
 M. & M., Moody and Malkin.  
 N. R., New Reports by Bosanquet and Puller.  
 Pea., Peake's Reports.  
 Pea. Ev., Peake's Evidence.  
 P. Wms., Peere William's Reports.  
 Plow., Plowden's Reports.  
 Phil. Ev., Phillipp's Evidence.  
 Poph., Popham's Reports.  
 Raym., Lord Raymond's Reports.  
 T. Raym., Sir Thomas Raymond's Reports.  
 Roll. Ab., Rolle's Abridgment.  
 Roll. R. Rolle's Reports.  
 R. & M., Ryan & Moody's Reports.  
 Salk. Sal., Salkeld's Reports.  
 Saund., Saun., Saunder's Reports.  
 Say. R., Sayer's Reports.  
 Sel. N. P., Selwyn's Nisi Prius.  
 Show., Shower's Reports.  
 Sid., Siderfin's Reports.  
 Str., Strange's Reports.  
 Star. E., Starkie's Evidence.  
 Star. R., Starkie's Reports.  
 Skin., Skinner's Reports.  
 Steph., Stephen's Reports.  
 Sty., Style's Reports.  
 Taunt. Taun., Taunton's Reports.  
 T. R., Term Reports.  
 Th. D., Thelol's Digest.  
 Vaugh., Vaughan's Reports.  
 Vent., Ventris's Reports.  
 Ver., Vernon's Reports.  
 Ves. R., Vesey's Reports.  
 Ves. Jr., Vesey Junior Reports.  
 Vin. Ab., Viner's Abridgment.  
 Wils., Wilson's Reports.  
 Went., Wentworth's Pleading.  
 Yel., Yelverton's Reports.  
 Yo. & J., Young & Jarvis's Reports.

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# PLEADING AND EVIDENCE;

WITH

## PRACTICAL FORMS.

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### ABATEMENT.

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### *Pleas to the Jurisdiction.*

THESE pleas, though technically different from other pleas in abatement in the three following points of form—1. in being always pleaded in person; 2. in requiring only half defence; 3. in concluding “if the court will take cognizance, &c., that the bill be quashed;” yet, in other respects, are essentially the same, as they abate the writ: *Bac. A. Pleas, E. 2. 3 Bl. C. 301. Gilb. C. P. 187.*

The courts of Westminster have jurisdiction in all *transitory* actions, and *local* actions in England and Wales, 1 *Wood*, 193, *Andr.* 198, unless it be taken away by stat., or the plt. show by his declaration that the action occurred in an exclusive jurisdiction: 1 *Wood*, 193; *Bac. A. Pleas, E. 1.* And objections to their jurisdiction must in general be pleaded, but in some cases it may be given in evidence under the general issue, *Carth.* 11, 354, 5 *Mod.* 144; as where the court has no jurisdiction at common law, or it has been taken away by stat.: 6 *East*, 583; 1 *East*, 352; 4 *T. R.* 503. Sometimes a statute requires a special plea, but in *inferior* courts nothing can be intended to be within their jurisdiction unless so expressly alleged; therefore, in most of the inferior courts, the want of jurisdiction, though not taken advantage of by plea, is fatal, either by nonsuit, bill of exceptions, prohibition, or a writ of false judgment: *Gilb. C. P.* 188, 189; 1 *Saund.* 98, n. 1. It is best, however, for the deft. to plead to the jurisdiction in these cases; *Bac. A. Courts, D. 4.* Some pleas to the jurisdiction are created by the privilege of suing in particular courts, as in the case of attorneys and other officers of the court: *post.*

\* A plea to the jurisdiction in the inferior courts must be pleaded [\*2] within four days after declaration, 8 *T. R.* 474, and before impar-

lance: *Gilb. C. P.* 187. It cannot be pleaded after any other plea which has admitted the jurisdiction. It must be verified by affidavit: 4 *Ann. c.* 16, s. 11. For other matters as to when a deft. may plead to the jurisdiction, and the forms and qualities of the plea, see 1 *Chit. Pl.* 380 to 386. This plea is not so frequent in practice as to require other observations here.

### *Pleas in Abatement in general.*

These pleas differ from pleas in bar, as they tend merely to defeat the present suit; they may be arranged in the following order:—

1. To the disability of the person either of the deft. or plt.
2. To the declaration or count.
3. To the writ for matter apparent on the face of it, or matter *dehors*.
4. To the action of the writ.

And in this order they ought to be pleaded, as every subsequent plea waves the ground of the foregoing.

*Pleas to the Disability of the Person of the Plaintiff* either deny his *existence* as fictitious or dead, 1 *Wils.* 302, *Co. D. Abt. E.* 16, 17, *B. Ab. L.* (and, where a sole plt. dies, pending the suit, it is a ground of abatement; but, if there are more than one, the cause of action survives to the others, by 8 and 9 *Wil.* 3, c. 11, s. 7, 2 *Saund.* 72. h, *Com. D. Abt. H.* 32, 33); or deny his *ability* to sue, as an alien enemy, *Com. D. Abt. E.* 4, 2 *Str.* 1082; as outlawed upon mesne or final process, *Gilb. C. P.* 196, *Co. D. Abt. L.* 3, 1 *East*, 634; as attainted of treason or felony, *Carth.* 137, 138 (though this is sometimes pleadable in bar, 2 *B. & A.* 258); as an infant, and that he has declared by attorney, 2 *Saund.* 209, a.; or as covert, *post, Coverture*, 5. But a person outlawed, or attainted, may sue in *autre droit*, or for another's benefit: *Fost. c.* 61.

*Pleas to the Disability of the Person of the Defendant* are coverture or infancy, see *post*, "*Coverture*, 5;" when the deft. is sued as heir on the obligation of his ancestor, in which case the parol shall demur, or proceedings be stayed till he comes of age, *Co. D. Inft. D.* 4 *Ea.* 485, 4 *T. R.* 77; but an infant devisee cannot do this; 4 *Ea.* 485.

*Pleas to the Count* do not now occur, as the court will not grant oyer of the writ: 2 *Wils.* 394–5; *Tidd*, 687.

*Pleas in Abatement of the Writ* are so termed from their effect, as, strictly speaking, the refusal of oyer of the writ prevents an objection to it: but, as the declaration is presumed to agree with the writ, any mistake carried out into it may be the subject of a plea in abatement, to the writ or bill: 1 *B. & P.* 648; 3 *B. & P.* 399. Matter *apparent* on the face of the writ, such as an omission of the deft.'s addition, and other defects which do not appear in the declaration, are no longer subjects of abatement, 1 *Saund.* 318, 3 *B. & P.* 399; but matter *dehors*, such as misnomer, non-joinder, &c., which are existing defects at the time of suing out the writ, are: see *post*, as to these pleas.

*Pleas in Abatement to the Action of the Writ* are, that it is misconceived or prematurely brought, &c.; but, as these matters are ground of nonsuit and demurrer, they are rarely pleaded in abatement: 2 *Saund.*

210, *a.*; *Lutw.* 8, 13. It may also be pleaded that there is another action pending, 5 *Co. R.* 62, *a.*, in the same court or in another: 1 *Camp.* 60-1, *post*, 17.

*\*Qualities and Forms of Pleas in Abatement.* [\*3]

*Title.]* Pleas in abatement should, in general, be entitled of the term in which the writ was returnable, and ought to be pleaded before general imparlance, 2 *M. & S.* 484, and within four days inclusive after the delivery, or filing, and notice of the declaration, 1 *T. R.* 277; unless filed in vacation, or too late in the term; when the deft. has four days of the ensuing term to plead in, 7 *T. R.* 447, *n. d.* 6 *ib.* 369; or unless the last of the four days be a Sunday, when the deft. has the whole Monday to plead in: 3 *T. R.* 642. If the deft. plead in abatement in the second term, he should do so with a *special* imparlance: 2 *Saund.* 1, 2. And, if the plea be entitled of a subsequent term without the proper imparlance, plt. may sign judgment, 4 *T. R.* 520, 2 *Saund.* 1, or move to set it aside, 6 *T. R.* 373; or demur, 2 *M. & S.* 484; or allege the imparlance in the replication by way of estoppel: 2 *Saund.* 1. *n.* 2. But, if the plt. reply to the plea generally, the fault is cured: *ib.* Where an attorney is sued in vacation, entitling the plea as of the preceding term the bill is entitled of, is not improper: *Holme v. Dalby*, 1 *Chitt. R.* 704; 3 *B. & A.* 259, *S. C.*

*Commencement—Appearance—Defence, &c.]* Care must be taken that the deft.'s and plt.'s names be stated properly; see the forms, *post*. Most pleas in abatement may be pleaded by attorney; a married woman, however, can only plead her coverture in person, as she cannot appoint an attorney: 2 *Saund.* 209, *b.* So, in the case of misnomer, unless under a special warrant of attorney, *ib.*; but see 10 *East*, 85. An infant must plead by guardian, and not by attorney or *prochein amy*: 2 *Saund.* 117, *f. n.* 1.; 212, *a. n.* 4; 1 *Moore*, 250; 5 *B. & A.* 418. These pleas should be pleaded after half and before full defence: 2 *Saund.* 209, *c.* Misnomer of deft. should, in strictness, be pleaded without defence: 2 *Saund.* 209, *c.*; 8 *T. R.* 631, *post*, 10. When the deft. pleads in abatement to the writ for matter *apparent* on the face of it, it is usual to begin as well as conclude the plea by praying judgment of the writ, and that the same may be quashed; but this is not so where the plea is for matter *dehors*: 2 *Saund.* 209, *a. n.* 1; 209, *d.*; 10 *East*, 87.

*Subject Matter of Plea.]* The greatest possible precision and certainty are required in pleas in abatement. They must be certain to every intent, and nothing be left to intendment: 2 *Saund.* 209, *c. d.* Thus, a plea of misnomer must not only state the real name, but also aver that by that name, the party was known and called at the time of the issuing of the writ, or exhibiting the bill; and also conclude with a special traverse of his ever having been called or known by the name in the writ or bill: see *Golds.* 86; *Skin.* 620; *Lutw.* 15; 2 *Saund.* 209, *b. n.* The plea must not be repugnant, *Carth.* 207, 5 *T. R.* 487; nor double, as pleading two outlawries: *Carth.* 8, 9; 1 *Show.* 80; *Hardw.* 286; 2 *Lev.* 82. It must be an answer to the whole declaration; that is, the whole matter

of complaint must be covered by the plea or pleas pleaded, 5 *T. R.* 553; for there may be a plea in abatement to part, and in bar to the residue, or the like.—The plea must also give the plt. a better writ; for, if it show plt. could not have any writ at all, the plea should be in bar, and not in abatement; 4 *T. R.* 227; 2 *B. & P.* 124, n.; 8 *T. R.* 515; 5 *Taunt.* 653. A plea, however, to the whole matter and substance of the writ need not give the plt. a better writ: *Th. D.* 15. c. 1, s. 4. A variety of cases peculiarly applicable to the subject matter in the forms hereafter given will be found there.

*Venue.*] No venue is necessary; and, though a wrong venue be stated, it is immaterial: 7 *T. R.* 243; 1 *Salk.* 4; *Skin.* 620.

*\*Conclusion, &c.*] In pleas in abatement, the court will give no [\*4] other judgment than that prayed for by the party: 10 *East*, 87; 1 *B. & A.* 172. Great care must therefore be taken in stating a proper conclusion. When the action is by original, the deft., in pleading to the writ or count, should conclude his plea by praying judgment “of the writ or count,” and that the same may be quashed: 5 *Moo.* 132. When by bill, the plea should conclude by praying judgment “of the bill,” and not of the declaration, nor even, as it seems, of the bill and declaration: 2 *M. & S.* 484; 2 *B. & P.* 124, n. c. (but not so if the proceedings be by original: 2 *Saund.* 209.) And, by bill, it is bad to conclude with a prayer that the writ and declaration (1 *B. & A.* 172), or that the *declaration* alone, be quashed: 2 *Chitt. R.* 539.

When the deft. pleads in abatement for nonjoinder to the whole of the action, it is sufficient to plead to the “*writ*” or “*bill*” only, without adding “and declaration;” but, where it is intended to plead in abatement only of *part* of the writ, and the cause of abatement arises from some of the counts, the deft. must plead in abatement of both the writ and declaration: 2 *B. & P.* 420; 2 *Saund.* 210, c. If a plea in abatement conclude with praying judgment “of the bill,” and that the same be quashed, it is bad on demurrer: 3 *T. R.* 185. And in abatement the deft. never can have a right judgment on a wrong prayer, as in bar: 1 *B. & A.* 173. Pleas of coverture of the plt. or deft. conclude to the writ or bill, being in the nature of pleas of nonjoinder, and not as in pleading to the person of plt. and deft.: 2 *Saund.* 9, n. 10.

### *Affidavit of Truth of Plea.*

*Stat. 4 Anne*, c. 16, s. 11, requires an affidavit to show some probable matter to the court to induce them to believe that the plea is true. It is not necessary that the plea should be made by the party himself; his attorney will do: *Barn.* 344. It must be positive, *Say. R.* 293, and be properly *entitled* of the cause: 1 *Str.* 1161. If the plea be not filed in due time, *ante*, 7; with an affidavit of *the truth* of it annexed, or the affidavit be an improper one, 1 *Str.* 639, 3 *Pri.* 197, the plt. may consider it as a nullity, and sign judgment; or he may move the court to set it aside: 2 *Moo.* 213; 2 *B. & C.* 618; 3 *Pri.* 197; *Tidd*, 693; 2 *Arch. Pr.* 2, 3. If the truth of the plea appear to the court upon an inspection of their own records, an affidavit is not necessary: 2 *W. Bl.* 1088; 3 *B. & P.* 397.

*Qualities and Forms of Replication, and other Proceedings.*

When a plea in abatement is regularly put in, the plt. must either reply or demur, *infra*; and, if the plea be untrue in fact, he should reply, in which case he will have final judgment, *quod recuperet*, and the jury should assess the damages: *Gilb. C. P.* 53; 1 *Ld. Raym.* 594; 2 *Saund.* 210—11. After a plea of misnomer, or the like, plt. may amend his declaration, *Tidd*, 753, though a mistake would be aided after verdict, 1 *Wils.* 302, 6 *Taunt.* 115; but, in the case of a true plea of nonjoinder, plt. must enter a *cassetur billu vel breve*, and commence a fresh action: 7 *T. R.* 698; 1 *B. & P.* 40; 2 *B. & C.* 871; 3 *Anst.* 935. It is safest to enter the *cassetur* before bringing the second action: 1 *Salk.* 329; 2 *Raym.* 1014. Plt. is not liable to costs on a *cassetur*: *Tidd*, 737.

*Commencement.*] When the plea consists of matter of fact which the plt denies, the replication may begin without any allegation that the writ or bill ought not to be quashed: 1 *B. & P.* 61. It must not commence as to a plea in bar, *Carth.* 187, *Com. D. Abt.* I. 15, unless the plea \*com- [\*5] mence or conclude improperly: *Bac. Ab. Abt.* 8. But if a replication to a plea in abatement begin, "that the said declaration ought not to be quashed," but conclude properly, it is sufficient, and such words may be rejected as surplusage: 1 *B. & P.* 60.

*Conclusion.*] It should conclude, "to the country;" and it is not necessary that it should conclude with a verification and formal traverse: 1 *B. & P.* 60; 1 *East*, 542. But, if it do so conclude, it is said the plt. ought to pray damages, 2 *Saund.* 211, n. 3, unless he confess deft.'s plea, and avoids it by other new matter, when he should not pray damages, but must maintain his writ: *ib.*

*Demurrer.*] A general demurrer to a plea in abatement is sufficient: *Lloyd v. Williams*, 2 *M. & S.* 485. It may be advisable, however, to demur specially, where the plea is merely informal, 3 *T. R.* 186, as the court will not quash it on motion: 2 *B. & C.* 618. A demurrer to a plea, with a proper commencement and conclusion, should merely pray judgment, "that the writ or bill be adjudged good, and that the defendant may answer thereto:" 2 *Saund.* 210, g. On a joinder in demurrer to a replication to a plea in abatement, the plt. should merely pray that the deft. may answer over: *ib.*; 1 *Wils.* 302. A demurrer to a plea in abatement, as in bar, praying judgment and damages, and a joinder in demurrer, as in bar, is a discontinuance: *Show*, 255. But, where the plea is wrong in its commencement and conclusion, as being a plea in bar, this objection would not hold: *Bac. Ab. Abt. P.*; *Co. D. Abt.* I. 15. Plt. may amend his mistake in a demurrer or replication; and he will be allowed to withdraw a demurrer to the plea, and reply, 2 *Chit. R.* 5; but the court will not in general allow the deft. to amend: *Tidd*, 690. Judgment will be given against the plea for a defect in it, without regard to any objection to the declaration, for nothing but the writ is in question: 2 *Salk.* 212; *Lutw.* 1592.

*Judgment.*] If issue be joined on a plea of abatement, a judgment for the plaintiff upon a verdict is final, *quod recuperet*: 2 *Wils.* 367; 2 *Ld. Raym.* 992; *Tidd*, 979. But a judgment for him upon demurrer is not

final, but merely a *respondeat ouster*, whereon he does not obtain costs: *Yelv.* 112; 1 *Vent.* 137; *Raym.* 992; *Tidd*, 979. But the judgment on a demurrer to the plea, improperly commencing or concluding in bar, may be final, *Com. D. Abt.* I. 15, 1 *East*, 636; and so where matter in abatement is pleaded after the last continuance, *ib.* A judgment for the deft., in all cases, is that the writ or bill be quashed, *Gilb. C. P.* 52; or, if a temporary disability or privilege be pleaded, as infancy, &c. the judgment is, "that the plt. remain without day," until, &c.: *Lutw.* 19; 2 *Saund.* 210. On issue found for deft., he is entitled to costs, but not on a demurrer: *Raym.* 337; *Tidd*, 983, 1008. After a judgment of *respondeat ouster*, deft. may plead again in abatement, provided the subject matter pleaded be not of the same or of any preceding degree or class with that before pleaded: *Com. D. Abt.* I. 3; 2 *Saund.* 40.

### COVERTURE.

*When it may be pleaded, 5 to 6.*

*Forms in, 6 to 8.*

*Notes on Forms, 8.*

*Evidence, 9.*

*Of Plaintiff.]* The *plt.*'s coverture is pleadable in abatement: *Co. Lit.* 132, *b.* And, where the *feme* was interested before or during her coverture in the subject matter of the action, and might join with the [\*6] \*husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be otherwise taken advantage of, at least in actions for torts, 3 *T. R.* 627, 631; but the husband may bring error: *ib.* So, if a *feme sole* marry after suing out the writ and before declaration, it can only be taken advantage of by plea in abatement: 6 *T. R.* 265. And, if she marry after issue joined, then by plea in abatement, *puis darr. cont.*, 4 *East*, 502. But it is no defence in abatement or otherwise, if *plt.* married after verdict, and before the day in bank: *Cro. C.* 132; 1 *Buls.* 5. When a *feme coverte* has no interest whatever in the subject matter of the action, and improperly sues alone, the deft. may take advantage of it, under the general issue, 4 *T. R.* 361, or plead she is deft.'s wife: 17 *Edw.* 3, 20, *b.* If she be improperly joined, the deft. in some cases may demur, 1 *Salk.* 114, 1 *H. Bl.* 108, or arrest the judgment, *Cro. J.* 644, or bring error, 2 *W. Bl.* 1236. Deft. may plead the *pltfs.* are not married, 1 *Show*, 50, *Fitz. N. B.* 476, *Co. D. Abt. E.* 6; and he cannot take advantage of this under the general issue: 1 *Str.* 480. If the husband improperly sue alone, he may be nonsuited, 1 *Salk.* 282, *Bac. Ab. Bar. & F. K.*; or, if the objection appear on the record, deft. may arrest the judgment, or bring error: 1 *Str.* 229; *Cro. J.* 424.

*Of Defendant.]* The *def't.*'s coverture is also pleadable in abatement. When the deft. becomes married after the contract was made, or the cause of action accrued, and before action brought, the coverture is pleadable only in abatement: 3 *T. R.* 631. If the marriage is after action brought, it cannot be pleaded in abatement, *Bac. Ab. Abt. G.* 2 *Str.* 811; and the

plt. may, in that case, have judgment and execution against her, or revive the judgment against her and her husband: 4 *East*, 521. Deft.'s coverture, when the supposed contract was entered into, or cause of action accrued, is available as a defence under the general issue, or *non est factum*: 12 *Mod.* 101; 8 *T. R.* 545. If parties be improperly sued as husband and wife, the same may be taken advantage of under the general issue, and is not pleadable: 2 *Chit. R.* 642. *Sed vide Th. Dig.* l. 11, c. 2, s. 5.

*In general.*] Coverture cannot be pleaded with success, if the husband, at the time of plea, be dead, or *civiliter mortuus*, or banished, or transported for a crime, or an alien enemy residing abroad, *Schw. N. P.* 285 to 287, 4 *T. R.* 631, 2 *B. & P.* 105, 4 *Esp. Rep.* 27, or an alien who has never been in this country, 3 *Camp.* 123, or has abjured the realm, 2 *W. Bl.* 1199, 4 *B. & C.* 297, or divorced *à vinculo matrimonii*, 3 *B. & C.* 291, or if the party be the wife of a foreigner resident abroad, and she live and trade here as a *feme sole*, 1 *B. & P.* 357: all which facts may be pleaded. But it is no answer to the plea, that the parties are separated, and that the wife has a separate maintenance secured to her by deed, 8 *T. R.* 545, or that the husband, an Englishman, be abroad, 2 *B. & P.* 226, or that the parties are divorced *à mensâ et thoro*: 3 *B. & C.* 291.

As to the parties to an action by or against husband and wife, *post*, "*Husband and Wife.*"

### Forms in Coverture.

#### PLEA OF PLAINTIFF'S COVERTURE.

In the K. B. (or C. P.)

Term, 8 Geo. 4.

(Term of which declaration is entitled.)

*John Hall* } And the said John Hall, in his own person (if by attorney, say, by \_\_\_\_\_,   
 ats. } his attorney) comes and defends the wrong and injury, when, &c. and prays   
 *Sarah Moss.* } judgment of the said bill (if by original or in C. P., the said writ), of the said   
 Sarah Moss, because he says that the said Sarah, before and at the time of exhibiting the bill (or the said writ), of the said Sarah, was under coverture of one James Moss, her husband, which said James Moss is still living; to wit, at, "(venue.) And this he is ready to verify. [\*7] Wherefore, inasmuch as the said James Moss is not named in the said bill (or writ), the said John Hall prays judgment of the said bill (or writ), and that the same may be quashed, &c. (Add affidavit, as post, 8.)

#### PLEA OF DEFENDANT'S COVERTURE.

In the K. B. (or C. P.)

Term, 8 Geo. 4.

(Term of which declaration is entitled.)

*Jane Mills,* } And the said Jane Mills, in her own proper person, comes   
 sued by the name of *Jane Ord,* } and prays judgment of the said bill (or by original, or if in C.   
 ats. } P., the said writ), of the said John Stone, because she says, that   
 *John Stone.* } at the time of the exhibiting of the said bill (or the said writ),   
 of the said John Stone, she was, and still is, married to one Henry Mills, who is still living, to wit, at, &c., aforesaid. And this she is ready to verify. Wherefore, because the said Henry Mills is not named in the bill (or writ), aforesaid, she prays judgment of the said bill (or writ), that the same may be quashed. (Add affidavit, as post, 8.)

#### PLEA THAT ANOTHER SUED WITH, AND AS THE WIFE OF DEFENDANT, IS NOT SUCH.

In the K. B. (or C. P.)

Term, 8 Geo. 4.

*John Styles,* } And the said John Styles, by \_\_\_\_\_, his attorney, comes and   
 sued with *Sarah Styles,* } prays judgment of the said bill (or if by original, or in C. P., of the   
 ats. } said writ), of the said John Nokes, because he says that Sarah Styles,   
 *John Nokes.* } in the said bill, (or by original, or in C. P. in the said writ and the   
 declaration thereon founded), alleged to be the wife of him the said John Styles, is not nor ever



hath been the wife of him the said John Styles. And this he is ready to verify. Wherefore, because he, the said John Styles, is named in the said bill (or by original, or in C. P. in the said writ of the said John Nokes, and declaration thereon founded), as the husband of the said Sarah Styles, he, the said John Styles, prays judgment of the bill (or writ) aforesaid, and that the same may be quashed. (*Add Affidavit, as post, 8.*)

PLEA WHEN PLEADED OF A TERM SUBSEQUENT TO DECLARATION.

In the K. B. (or C. P.)

—Term, 8 Geo. 4.

*Jane Mills,*  
sued by the name of *Jane Ord,* } And now, at this day, that is to say, on ———, next  
ats. } after (first day in full term), until which day *Jane Mills*  
*John Stone.* } (against whom the said *John Stone* hath exhibited his said bill,  
of exception to the said bill of the said *John Stone*, had leave to imparl thereto, and then to answer the same, &c., before our said lord the king, at Westminster, come, as well as the said *John Stone*, by ———, his attorney, as the said *Jane Mills* in her own proper person; and the said *Jane Mills* says, &c. (*State subject matter of plea, as usual. If declaration be against deft. in the right name, there is no occasion to insert the above words, against whom, &c. between the brackets.*)

THE LIKE TO A DECLARATION BY ORIGINAL.

In the K. B. (or C. P.)

—Term, 8 Geo. 4.

*Jane Mills,*  
sued by the name of *Jane Ord,* } And *Jane Mills*, sued by the name of *Jane Ord* (or if the  
ats. } deft. be sued by the right name, say, and the said *Jane Mills*, in  
*John Stone.* } her, &c.), in her proper person comes, and, saving to herself all  
of exception to the said bill of the said *John Stone*, had leave to imparl thereto, and then to answer the same, &c., before our said lord the king, at Westminster, come, as well as the said *John Stone*, by ———, his attorney, as the said *Jane Mills* in her own proper person; and the said *Jane Mills* says, &c. (*State subject matter of plea, as usual.*)

AFFIDAVIT TO VERIFY PLEA.

[\*8] In the K. B. (or C. P.)

Between

{ *John Stone*, plift.  
and  
{ *Jane Ord*, deft.

*Jane Mills* (sued by the name of *Jane Ord*), of ———, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact.

Sworn, &c.

*Jane Mills.*

REPLICATION TO PLEA OF COVERTURE DENYING THE FACT.

In the K. B. (or C. P.)

—Term, 8 Geo. 4.

*John Stone* } And the said *John Stone* saith that his said bill (or the said writ), by reason of any  
ats. } thing by the said *Jane Ord*, in her said plea above alleged, ought not to be quashed,  
*Jane Ord.* } because he says, that at the time of exhibiting the said bill (or at the time of issuing the said writ), against the said *Jane Ord*, she, the said *Jane Ord*, was not married to the said *Henry Mills*, in the said plea mentioned, in manner and form as the said *Jane Ord* hath above in her said plea in that behalf alleged; and this he, the said *John Stone*, prays may be inquired of by the country, &c.

Notes on Form of Plea, &c.

The preceding observations, as to forms of pleas, &c. in abatement in general, will be here applicable. We have seen the plea of deft.'s coverture must be pleaded in person, ante, 3. It must not also be pleaded by

the def't's maiden name : *Barn*. 334. It must be averred the husband is still living : 1 *Chit. Pl.* 389. These pleas, as the cause of abatement goes rather to the nonjoinder of the husband than to the disability of the *feme*, should conclude with a prayer of judgment to the bill or writ : *Lil. En.* I. 123 ; 1 *Chit. Pl.* 400.

If the plt. do not merely deny the coverture, but relies on some other answer, as the death of the husband, or the like, the same should be replied specially.

### *Evidence in Coverture.*

*Who is to begin.*] According to the general principle, the def't. ought to begin by proving the truth of his plea, the affirmative of the issue being with him ; but the practice appears to have varied with circumstances. And where the essence of the inquiry is the amount of the plt.'s damages, he is entitled to begin. Therefore, on a plea of coverture to assumpsit for goods sold, &c. *Abbot, C. J.* "intimated that, as the plt. had to prove the amount of his damages, his counsel was, if he elected to do so, entitled to begin ; but, if he began, he must go into the whole of his case relating to the coverture:" but, the def't.'s counsel agreeing to admit that goods had been delivered to the amount claimed, was permitted to open the case for the def't. : *Lacon v. Higgins*, 3 *Stark.* 178. And it was so ruled on a plea of nonjoinder in assumpsit, by *Abbot, C. J.* in *Robey v. Howard*, 2 *ib.* 555-6. But, if the def't.'s testimony is such that plt. must necessarily be unacquainted with it, he may reserve his evidence to the plea in reply to the def't.'s case ; so where def't. endeavoured to support his plea by evidence of a secret partnership with one *Cohen*, *Abbot, C. J.* said, "The plt. does not know who *Cohen* is, except from the plea ; he cannot meet the case, till he is acquainted with it ; it might have been otherwise, had the account been originally made out in the name of *Levy and Cohen*." *Stansfield v. Levy*, 3 *Stark.* 8, 9.

Where the evidence is such as not to throw the necessity of any proof at all, as to the cause of action, on the plt., as in trespass, if def't. \*justifies, he has a right to begin, as "the question of damages never [\*9] arises until the issue has been tried." *Per Bailey, J., Jackson v. Hesketh*, 2 *Stark.* 518 ; *Hodges v. Holder*, 3 *Camp.* 367 ; *Bedell v. Russell, R. & M.* 293.

*Proof for Defendant.*] It will be sufficient to prove cohabitation under marriage by repute, which may be established by "general reputation, the acknowledgment of the parties, and reception of their friends as man and wife," &c. : *per Ld. Kenyon, Leader v. Barry*, 1 *Esp. Rep.* 354. But unless the parties live together, some proof of an actual marriage seems necessary : *Wilson v. Mitchell*, 3 *Camp.* 394 ; *Horn v. Noel*, 1 *Camp.* 61. And, when such proof is required, it is usually established by the production and proof of register of marriage, or an examined copy of it, with proof of identity of parties ; for which, and the best evidence of marriage, whether in England or abroad, see *post*, "*Crim. Con.*" It must be proved the husband was alive at time of contracting debt, or cause of action accruing and plea pleaded. Presumptive evidence of having

been heard of and alive within seven years will do: *Hopewell v. De Pinna*, 2 *Camp.* 113. Proof of letters written to his friends in this country, if he be abroad, or other similar evidence, will suffice for this purpose: *ib.*; *Peake's Ev.* 377.

*Proof for Plaintiff.]* If plt.'s answer to the plea is the *transportation* of the husband, this must be proved by a transcript of the conviction, furnished by the clerk of assize or of the peace for the county where the conviction took place, which is sufficient evidence by 6 *Geo.* 1, c. 23, s. 7, and 56 *Geo.* 3, c. 27, s. 8, and also by proving the prisoner's identity.

*Damages.]* The plt. should, on the trial of an issue as to coverture, as in all other cases of abatement, where damages are the principal object of the action, be prepared to prove the damages, and that the jury, if they find for him, assess them; otherwise, as an omission in this respect cannot be supplied by a writ of inquiry, a *venire de novo* must be awarded: 2 *Wils.* 367; 2 *Saund.* 211, a.

### MISNOMER.

*When it may be pleaded*, 9.

*Forms in*, 11.

*Notes on Forms*, 12.

*Evidence*, 13.

*Of Plaintiff's name.]* A misnomer in or omission of the *plaintiff's* *Christian* name, if it appear in the declaration, may be pleaded in abatement, although he be known also by the name by which he sues: 1 *B. & P.* 44; 3 *Camp.* 29. And such plea is the only means of taking advantage of the mistake: 6 *M. & S.* 45; 2 *B. & B.* 34; 1 *B. & P.* 40, 645. A plt. may sue by his name of baptism, or by his name of confirmation, or both: 6 *Mod.* 115, 6; 2 *Ld. Raym.* 1015, 6. So, a misnomer of *plts.*, a corporation aggregate, in its name of incorporation, may be pleaded in abatement; such as stating the *Christian* name of one of the members, or the like, when it was not incorporated by that name: 1 *Leon.* 307; 2 *Inst.* 666; 12 *East*, 4, 10. More strictness is required in stating the name of incorporation than in the case of grants and obligations: 6 *Co.* 65, 10 *Co.* 87. And more strictness is required in stating the name of a corporation newly created than one created before the time of legal memory: [\*10] \**Cro. El.* 351; *Hob.* 211; *Noy*, 54. A peer must sue by his *Christian* name, as well as that of dignity. Transposing two *Christian* names, as *James Richard* for *Richard James*, is a misnomer: 5 *T. R.* 195.

Where a surname is *idem sonans*, it is no cause for abatement; but the names of *Shakpear* and *Shakspeare* are not so: for, as observed by *Ld. Ellenborough*, "the final *e* might not make a material difference, but the omission of the *s* in the middle makes it a different sounding name from the true one." 10 *East*, 83. There are some names, though differing in

sound and orthography, are deemed the same; and a man may plead or be impleaded by one or the other indifferently: as, *Jane* for *Joan*, *Jean* for *John*, *Garret*, *Gerat*, and *Gerald*, *Saunders* and *Alexander*, have been holden the same: 2 *Rol. Ab.* 135; 1 *Leon.* 147. So, *Piers* and *Peter*: *Cro. Jac.* 225. But *Ralph* and *Randall*, *Sibel* and *Isabella*, are not the same: see 2 *Rol. Ab.* 135; *Bac. A. Misnomer, A.*

A misnomer in or omission of *plaintiff's surname*, if it appear in the declaration, is in the same manner pleadable in abatement, although the misnomer of the christian name be also pleaded: *Hardw.* 286; *Bac. Ab. Misnomer, F.* But he need not sue in the *surname* in which he was baptized or confirmed; his acquired name will suffice: *Th. Di. l. 3, c. 2, s. 1*; 3 *M. & S.* 450. And so much strictness is not required in the insertion of the plt.'s surname, if he be pointed out by other explanatory means, as stating him to be A. the son of B. C. or the like: *Com. D. Abt. E.* 19.

*Defendant's Name.]* A misnomer in or omission of *defendant's Christian* name, if it appear on the declaration, is also pleadable in abatement, *Lutw.* 10; 6 *Taunt.* 115; and is the only means of taking advantage of the objection in non-bailable cases: 7 *D. & R.* But deft. may, under circumstances, in bailable actions, get discharged on common bail: 1 *Chit. R.* 282. *Lake v. Silk*, 11 *Moo. Rep.* 57. In some cases, indeed, in the statement of a contract, a misnomer would be fatal at the trial: 4 *T. R.* 611. The deft. may be sued by the name in which he was baptized, *Lutw.* 10, or confirmed, *Co. Lit.* 3, or both, 6 *Mod.* 115, 6, 2 *Ld. Raym.* 1015, 6, or by the name he has usually been known by and called himself: *Com. D. Ab. F.* 18; 6 *Mod.* 116; 4 *Mod.* 347. If a deft. execute a deed or specialty, though by a wrong name, he should be sued by that name: 3 *Taunt.* 504; *Dyer*, 279. If the deft. put in bail, or the like, by his wrong name, without noticing the error, he is estopped afterwards disputing it, and that fact may be replied as matter of estoppel: *Bac. A. Pleas, l. 11*; *Tidd*, 253; 1 *Ld. Raym.* 249; see form, 3 *Chit. Pl.* 1143. The points above noticed as to the name of a corporation, and the names being transposed, or *idem sonans*, or of the same nature throughout *idem sonans*, will be here applicable: *suprà*. It is no cause of *demurrer* that a deft. is sued by the name of J. otherwise *F. S.*: 3 *East*, 111.

A misnomer in or omission of *defendant's surname* is in the same manner pleadable in abatement: 4 *Mod.* 347; *Asst. En.* 1. The points noticed as to a mistake in plt.'s surname are here applicable. Where there are father and son, or the like, of the same name, if the process be improperly served, and the wrong person be declared against, he may plead it in abatement: see *Com. D. Abt. F.* 21. If judgment be obtained against him by a wrong name, and plt. afterwards sue him for the same cause of action in his right name, he may plead the judgment recovered, with averment of his being the same person: 2 *Str.* 1218.

*Name of Dignity, Office, &c.]* If the plt. or deft. have a name of dignity of this realm, as duke, earl, baronet, knight, bishop, &c. and it be omitted or mistaken, the same may be taken advantage of by plea in abatement: *Com. D. Abt. F.* 19, *E.* 18, 19, 20; 1 *B. & C.* 871; *Hob.* 129; *Palm.* 345; 4 *D. & R.* 592. So, if either have a name of dignity given

him in the declaration when he has it not, the same is pleadable in [\*11] \*abatement: *Reg. Pl.* 287; 1 *Vent.* 154; 2 *Salk.* 415; *Com. D.*

*Abt. F.* 19. A deft. sued as an attorney or the like cannot *plead* he is not one: 5 *M. & S.* 314; 6 *B. & C.* 77. If a plt. sue, or a deft. be sued, for any thing relating peculiarly to his office, he should be named by his name of office, in addition to his other names, or the omission or mistake is pleadable in abatement: *Com. D. Abt. E.* 22. *F.* 20.

*Where several Defendants, &c.]* A misnomer as to one of several defts. cannot be taken advantage of, but by himself: 30 *Ed.* 3. 22; *Lutw.* 33. But a misnomer of the wife may be pleaded by both husband and wife, though he must also answer for himself: *Re. Pl.* 289; 6 *C.* 64, b.; *Th. Di. l.* 11, c. 5, s. 17.

*Amendment, &c.]* In cases of misnomer, plt. may amend, on payment of costs: 3 *M. & S.* 450: *Tidd*, 753. But this is not of course where there has been a tender: 1 *Chit. Pl.* 402, n. i. It is not necessary to enter a *cassetur billa*, as in the case of a nonjoinder: *ante*, 4.

### Forms of Pleas, &c. in Misnomer.

#### PLEA OF MISNOMER OF DEFT.'S CHRISTIAN NAME.

In the K. B. (or C. P. or Exchq.)

— Term, 8 Geo. 4.

(Term of declaration, if plea pleaded of a subsequent term: see forms, ante.)

John Smith,  
sued by the name of James Smith,  
ats.  
Henry Bell.  
And John Smith against whom the said Henry Bell hath exhibited his said bill by the name of James Smith (or if in C. P. or by original, say, and John Smith, against whom the said Henry Bell hath issued his said writ, and declared thereon, by the name of James Smith), in his own person comes and says, that he is named and called by the name of John Smith, and by that name and surname hath always, since the time of his nativity, hitherto been named and called; without this, that he, the said John Smith, now is, or ever was, named or called by the name of James, as by the said bill, (or if in C. P. or by original, say, as by the said writ, and declaration thereon founded) is supposed; and this, he, the said John Smith, is ready to verify. Wherefore he prays judgment of the said bill (or if in C. P. or by original, say, of the said writ and declaration thereon founded), and that the same may be quashed, &c. (*Add affidavit, ante*, 8.)

#### THE LIKE OF DEFT.'S SURNAME.

In the K. B. (or C. P. or Exchq.)

— Term, 8 Geo. 4.

(*Vide supra.*)

John Smith,  
sued by the name of John Todd,  
ats.  
Henry Bell.  
And John Smith, against whom the said Henry Bell hath exhibited his bill by the name of John Todd (or if in C. P. or by original, as in preceding form), in his own proper person comes and says, that he is named and called by the name of John Smith, and by the said surname of Smith hath always hitherto been called and known; without this, that he, the said John Smith, now is, or ever was, named or called or known by the surname of Todd, as by the said bill (or if in C. P. or by original, as in preceding form,) is supposed. And this he, the said John Smith, is ready to verify. Wherefore he prays judgment of the said bill (or if in C. P. or by original, as in preceding form), and that the same be quashed, &c. (*Add affidavit, ante*, 8.)

THE LIKE OF DEFT.'S CHRISTIAN NAME AND SURNAME.

"In the K. B. (or C. P. or Exchq.)

Term, 8 Geo. 4. [\*12]  
(*Vide suprà.*)

*John Hall,*  
sued by the name of *James Holt,* } And *John Hall*, against whom the said plaintiff hath exhibited his said bill (or if by original or in C. P., hath sued out his said writ, and declared thereon), by the name of *James Holt*, in his own proper person comes and says, that he is named and called by the name of *John Hall*; to wit, at, &c., and by that name and surname, from the time of his nativity, hitherto hath been called and known; without this, that he the said *John Hall* now is, or ever was, called or known by the name of *James Holt*, as by the said bill (or writ and declaration thereon founded) is above supposed. And this he is ready to verify. Wherefore he prays judgment of the said bill (or writ and declaration thereon founded), and that the same may be quashed, &c. (*Add affidavit, ante, 8.*)

MISNOMER OF PLT.'S SURNAME.

In the K. B. (or C. P. or Exchq.)

Term, 8 Geo. 4.  
(*Vide suprà.*)

*William Bowen,*  
ats. } And the said *William Bowen*, in his own proper person, comes and defends the wrong and injury, when, &c., and prays judgment of the said bill (or if in C. P. or by suing by the name of *Sarah Shipcott.* } original, say, of the said writ and declaration thereon founded), because he says that the said *Sarah* now is, and before and at the time of exhibiting the bill aforesaid (or suing out the said writ and declaration thereon, as aforesaid), was called and known by the surname of *Shipcott*; to wit, at, &c. (*Concluding as in the last precedent but one from the asterisk.*)

REPLICATION THAT DEFT. WAS KNOWN AS WELL BY THE ONE NAME AS THE OTHER.

In the K. B. (or C. P. or Exchq.)

Term, 8 Geo. 4.  
(*Same term as plea.*)

*Thomas Fell,* } And the said plt. saith that his said bill (or if by original or C. P., the said }  
v. } writ and declaration thereon founded), by reason of any thing by the said }  
*James Holt.* } *James Holt* in his said plea above alleged, ought not to be quashed, because }  
he saith that the said *James Holt*, long before, and at the time of the exhibiting the said bill (or issuing of the said writ and declaration thereon), was and still is called and known as well by the name of *James Holt* as by the name of *John Hall*; to wit, at, &c. aforesaid. And this he, the said plt. prays may be inquired of by the country. (*See form of replication of matter of estoppel, 3 Chit. Pl. 1143.*)

Notes on Form of Plea, &c.

The preceding notes, as to the forms of pleas, &c. in abatement in general, will be here applicable. In pleas of misnomer of deft.'s name, the plea must not begin, "And the said C. D." &c. or "He who is sued," &c.: 5 *T. R.* 487; 5 *Taunt.* 653; 2 *Saund.* 209, *b.* These pleas are generally pleaded in person, or by a special warrant of attorney, 2 *Saund.* 209 *b.*; but it is doubtful whether the not doing so is demurrable: 1 *Raym.* 509; 10 *East*, 85. Where an infant pleads, it must be by guardian, and not by attorney or *procchein amy*, even when sued in *autre droit*, as administrator, &c.: 1 *Moore*, 250; 7 *Taunt.* 488. The plea should, in strictness, be without defence: 2 *Saund.* 209, *c.*; 8 *T. R.* 631; *Carth.* 220; *ante*, 3. It is better to state the party was "named and called," instead of "called and known:" 3 *Chit. Pl.* 901, *n. g.* \*Some [\*13]

precedents state the deft. was "baptized," &c.; but this imposes a difficulty in proof, and is therefore objectionable: 1 *Camp.* 479; *Rep. temp. Hardw.* 286; 6 *Mo.* 116. Where deft. pleads a misnomer of Christian name, he must give both his Christian and surname, though his true surname is used in the declaration: 3 *T. R.* 185; 8 *T. R.* 515. It must be averred that the party was named and called by the real name at the time of purchase of the writ, or exhibiting the bill: *Goldsb.* 86; *Skin.* 620; 1 *Salk.* 6. And the plea must conclude with a special traverse of deft.'s having ever been named or called by the name in the writ or bill: *ib.* A misstatement in traverse of the name by which the deft. is called in the declaration will be fatal on demurrer: 1 *Chit. R.* 705. In a plea in abatement of deft.'s peerage, the plea should show how he derived his title, and that he is a peer of the united kingdom: 4 *D. & R.* 592; 2 *B. & C.* 871.

**Replication.]** The usual replication is that the party was named and called by one name as well as the other, or the misnomer may be denied. If the defendant has appeared by the name to which he was sued by, it may be replied by way of estoppel: 2 *N. R.* 453.

### *Evidence in Misnomer.*

*As to which party begins: ante, 8.*

**Proof for defendant.]** Where the party alleges that he was "named and called," it is sufficient for him to prove that he was *generally known* by that name. "But it is not sufficient to prove that he has been called so once or twice:" *Mestaer v. Hartz*, 3 *M. & S.* 453. Where deft. alleges that he was "baptized" by a name, he must adduce some *direct proof of his baptism* from the register, or by parties present at the ceremony; and letters of denization, commissions in the army by that name, and proof that he had been known in other countries by that name, are insufficient: *Weleker v. Peletier*, 1 *Camp.* 479. A plea of peerage must be proved by letters patent under the great seal: 2 *Salk.* 509. Deft. must be prepared to prove his plea promptly, as the court will not delay the trial for the attendance of witnesses: 2 *Chit. R.* 6.

**Proof for Plaintiff.]** Plt. should be prepared to prove his damages, in event of verdict being found for him: *ante*, 9.

The plt. should be prepared to disprove the deft.'s plea, the evidence for which purpose may be collected from the preceding notes as to when this plea is pleadable.

## NONJOINER.

*When it may be pleaded, 13 to 15.*

*Forms in, 15.*

*Notes on Form, 16.*

*Evidence, 16, 17.*

*Of Plaintiffs.]* When a joint contractor, parcener, tenant in common, or a party who has received a joint injury, and is jointly interested in the thing which was the subject of the action, is not, when he ought to be, joined as a *plaintiff*, the deft. may plead such nonjoinder in abatement, *Com. D. Abt. E.* 12, 1 *Saund.* 291, g.; and this is the only \*mode of deft.'s availing himself of the objection in an action for [\*14] a *tort*: 1 *Saund.* 291, g.; 6 *T. R.* 766; 7 *T. R.* 279. In an action on a contract, however, unless the party is suing in *autre droit*, the objection, if it do not appear on the pleadings, is available as a ground of nonsuit at the trial under the general issue, 1 *Saund.* 153, n. 1. 291, f. g.; 2 *Str.* 820; and for which reason it is best not to plead in abatement. If the plt. is suing in *autre droit*, as executor or administrator, the objection, if it do not appear on the pleadings, can be only taken advantage of by plea in abatement after oyer of probate, or letters of administration, 1 *Saund.* 291, g. h., 2 *Bing.* 177, and though plt. be a married woman, 3 *T. R.* 631; but this is not so in the case of assignees of a bankrupt suing: 2 *Stark.* 424. If the objection appear on the pleadings, deft. may demur, 2 *Str.* 1146, 1 *East*, 497, 1 *Saund.* 153, n. l. 291, f., or move in arrest of judgment, or bring error: *ib.* But, in such case, on account of costs, it is best to demur: *Cowp.* 407.; *Tidd*, 983. If one of several part-owners of a chattel sue alone for a *tort*, and the deft. do not plead in abatement, the other part-owners may afterwards sue alone for the injury to their undivided shares, and the deft. cannot plead in abatement to such action: 7 *T. R.* 279. As to nonjoinder in case of marriage, *ante*, 5, 6.

*Of Defendants.]* If a person be omitted as deft. who ought to be joined in any action founded on a joint contract, whether on a specialty or not, the objection can only be taken advantage of by a plea in abatement, 1 *Saund.* 291, b. n. 4, 5 *T. R.* 651, 1 *East*, 20, 4 *T. R.* 725, 3 *Camp.* 50; and, though the joint obligation be in writing, and the same appears to have been made by the party not joined, it is no variance at the trial: 1 *B. & A.* 224; 1 *Saund.* 291. If, indeed, it appears on the face of plt.'s pleadings, that another who is living, jointly contracted with deft., the deft. may demur, or arrest the judgment, or bring error, but it is no ground of nonsuit: 1 *Saund.* 291, b. 154; *South v. Tanner and others*, 2 *Taunt.* 254; 5 *Bur.* 2614; 2 *East*, 313; 2 *D. & R.* 439. In actions for *torts*, the nonjoinder of a party who was jointly concerned in the tort cannot be pleaded in abatement, or otherwise taken advantage of, as the plt. may in such action join all the parties who committed the tort, or not, at his election, 1 *Saund.* 291, e. & g. and cases there cited, 6 *Taunt.* 29, 35, 42; and this though it appear on the pleadings there were other wrong-doers: *ib.* In an action on the case against a common carrier, for not safely car-



rying a passenger, deft. cannot plead in abatement the nonjoinder of a co-proprietor: *Ansell v. Waterhouse*, 2 *Chit. R.* 1; 6 *Moore*, 154, 7 *Price*, 408; *Bretherton v. Wood*, 3 *B. & B.* 54. But though plt. change his form of action to *tort*, he is still liable to a plea of abatement for nonjoinder of any joint contractor, &c. if the action be substantially founded on a breach of contract, and so appear from the declaration, and it is not maintainable without proving a contract between the parties: *Powell v. Layton*, 2 *N. R.* 365; *Green v. Greenbank*, 12 *Marsh.* 485; 2 *Carth.* 454. And actions which concern *real* property materially differ in this respect from mere personal actions of *tort*; for, if one tenant in common only be sued in trespass, &c. for any thing respecting the land held in common, as for not setting out tithe, &c., he may plead the tenancy in common in abatement: 1 *Saund.* 191, *c.*; 5 *T. R.* 651.

*Misjoinder.*] If persons join as *plaintiffs* in an action who should not, the deft. may plead the misjoinder in abatement, *Cro. E.* 143, 473, 12 *H.* 4, 15, 54; or, if the objection do not appear on the plt.'s pleadings; it will be a ground of nonsuit at the trial, 3 *B. & P.* 235, *Co. Lit.* 197, *b.*, 3 *East*, 62; for which reason it is best not to plead in abatement. If the objection appears on the plt.'s pleadings, deft. may demur, or move in arrest of judgment, or bring error: 2 *Saund.* 115, 6; 3 *B. & P.* 150; 1 *Roll. Ab.* 31, *pl.* 9; *Sty.* 156; 3 *Lev.* 352. If too many persons [\*15] be \*joined as *defendants* in an action on a contract or specialty, if the objection do not appear on the plt.'s pleadings, the plt. may be nonsuited at the trial, 1 *East*, 52, 1 *Lev.* 63, 3 *T. R.* 662, 1 *Chit. P.* 34; or, if the objection appear on the pleadings, deft. may demur, move in arrest of judgment, or bring error: 7 *T. R.* 352. If several persons be made defts. jointly for a tort, where the tort could not, in point of law, be joint, as in slander or the like, they may demur, or if a verdict be taken against all, move in arrest of judgment, or bring error: 2 *N. R.* 454; 2 *Saund.* 117, *a.*

### Forms in Nonjoinder.

#### PLEA IN ASSUMPSIT OF NONJOINDER OF A CO-CONTRACTOR.

In the K. B. (or C. P.)

— Term, 8 Geo. 4.

(Term of declaration or subsequent term, with a special imparlance: ante 7.)

John Stiles } And the said deft. in his own proper person (or, if by an attorney, say, and the  
ats. } deft. by ———, his attorney, comes and defends the wrong and injury, when,  
John Nokes. } &c., and prays judgment of the said bill, or, if by original or in C. P., of the said  
writ and declaration); because he says that the said several promises and undertakings, in the said declaration mentioned, if any such were made, were, and each of them were, made by Joseph Brown and John Bell jointly with the said defendant, and which said Joseph and John are each of them still alive; to wit, at, &c., aforesaid. Wherefore, because they are not, nor is either of them, named in the said bill (or writ), the said defendant prays judgment of the said bill (or writ and declaration), and that the same may be quashed, &c. (Add affidavit, ante, 8. See a form in covenant, *Lil. Ent.* 7.)

PLEA THAT ANOTHER PERSON SIGNED THE BOND WITH DEFT.

In the C. P.

— Term, 8 Geo. 4.

*John Stiles* } And the said deft. by ———, his attorney, comes and defends the wrong  
ats. } and injury, when, &c., and prays oyer of the said writing obligatory, and it is  
*John Nokes* } read to him in these words (*here set out the bond, but not the condition*), which  
being read and heard, the said defendant says that the said George Thompson, in the said  
writing named, duly sealed and executed the said writing, and thereby became jointly bound  
with the said deft. to the said plt. to wit, on the same day and year aforesaid, at London  
aforesaid; and that the said George Thompson is still alive; to wit, at London aforesaid; and  
this he is ready to verify. Wherefore, inasmuch as the said George Thompson is not named  
in the said writ, the said defendant prays judgment of the said writ, and that the same may  
be quashed, &c. (*Add affidavit, ante, 8.*)

REPLICATION DENYING THE JOINT CONTRACT.

In the K. B. (or C. P.)

— Term, 8 Geo. 4.

(*Same term as plea.*)

*John Nokes* } And the said plt. saith that the said bill (*or the said writ and declaration, if*  
v. } *by original or in C. P.*), by reason of any thing above by the said deft. in plead-  
*John Stiles* } ing alleged, ought not to be quashed, because he saith that the said several prom-  
ises and undertakings were not made by the said defts. jointly and together with the said  
Joseph Brown and John Bell, in manner and form as the said deft. hath above, in his said  
plea in that behalf, alleged; and this the said plt. prays may be inquired of by the country, &c.

*Notes on a Form of Plea, &c.*

[\*16]

The preceding notes as to the form of pleas in abatement in general, *ante*, 3, will be here applicable. This plea may be pleaded by attorney: *Lutw.* 696. It is not necessary to plead in abatement both of the declaration and writ, when the plea is to the whole declaration; but, where the abatement is only to *part* of the writ, and the cause of abatement arises from some of the counts of the declaration, the deft. must plead in abatement of both; 2 *Saund.* 210. n. c.; and precedent, 2 *B. & P.* 420; 2 *M. & S.* 484, n.

The deft. in his plea must name *all* the joint contractors, for the purpose of giving a better writ, or he will fail; and the plt. will recover, if it appear at the trial that the contract was made by another, not named: *Pasmore v. Bousfield*, 1 *Stark.* 296; 2 *Bl. R.* 591; *Godson v. Good*, 2 *Mar.* 299; 6 *Taunt.* 587, *S. C.* The plea must expressly state, the party omitted is living; 1 *Saund.* 291, *a.* Also, in debt on a bond, &c. that the party sealed and delivered it: *ib.* In the case of executors or administrators suing, deft. should crave oyer of probate, or letters of administration to plead a nonjoinder in abatement: see form, 1 *Went.* 13, 58. It is not, in such a plea, necessary to state the will is proved: 2 *H.* 5, 8, *b.* 9; *Co.* 37, *b.* But it should state, that the executor not named administered the goods of testator: *Bro. Errs.* 20, 88; 1 *Lev.* 161; 1 *Saund.* 291, *g.*

Where the deft., having pleaded in abatement that four others were jointly liable, the court compelled him to deliver particulars of their residences and additions, *Taylor v. Harris*, 4 *B. & A.* 93, 1 *Y. & J.* 257; but, in another case, the court refused to compel the plt. to deliver to the deft. a copy of an agreement to enable him to plead that the agreement was jointly made by himself and others: 1 *D. & R.* 419.

*Evidence in Nonjoinder.*

*As to which party begins, ante, 8.*

*Proof for Defendant.]* The burden of the evidence lies upon the deft. who will have to prove that the party omitted was a partner, or joint contractor. As to proving a partnership, *post*, "*Partners.*" The declarations of the party not joined, if made before action brought, are evidence in support of the plea: *Clay v. Langstow*, 1 *M. & M.* 45.

*Proof for Plaintiff.]* A plea or objection, that the action is not brought jointly with a person who ought to have sued, the plt. may in answer prove that such person never was an ostensible, but a mere dormant partner, 2 *Taunt.* 324-5; 4 *B. & A.* 437, 3 *Stark.* 9, *R. & M.* 293; or that he was a mere nominal partner, having no interest, provided deft.'s interests would not be affected by the nonjoinder, 1 *Stark.* 25, 14 *East*, 210, 2 *Camp.* 302, 1 *C. & P.* 89; or an infant, 1 *Stark.* 25; or not a partner when the contract was made or the cause of action accrued, 1 *Esp. Rep.* 180; or that the party omitted did not seal, and refused to seal, the deed: 2 *Str.* 1146; 1 *Saund.* 291, *f.*, 154, *n.* 1; 3 *B. & C.* 254, 353; 6 *M. & S.* 75. But it is no answer to show that the party not joined was dead when action brought, 4 *B. & A.* 374, 2 *Saund.* 121 *n.*, 1 *B. & P.* 74; or that he was a bankrupt, 10 *East*, 418; or, in the case of executors or administrators, that the party not joined is an infant under 17 years of age, or has not proved the will, or has even refused before the ordinary, 1 *Salk.* 3, 3 *B. & A.* 863, 1 *Saund.* 291, *g.* 2, *ib.*, 209, 212; but it is an answer if it be proved he formally renounced before the ordinary: 4 *T. R.* 565. Nor is it any answer to prove that the parties, among themselves, agreed that the plt. alone should sue, 3 *M. & S.* 488.

[\*17] \*To a plea of nonjoinder of a person as a deft., plt. may in answer prove that such person was not a partner in the contract or cause of action, or a mere dormant partner: 3 *Price*, 538; 1 *Stark.* 338, 341, 272; *Holt. C.* 253; 4 *M. & S.* 475; 7 *T. R.* 361; 1 *Bing.* 201; 3 *Stark.* 8. As, where defendant ordered goods in the name of "*Levy and Co.*" it was held he could not plead a nonjoinder in abatement: 3 *Stark.* 8. Plt. may also show such person was a mere nominal partner, 2 *Camp.* 302, 14 *East*, 210, or infant or feme covert, the contract as to them being void on that account, 3 *Esp. Rep.* 76, 1 *Wils.* 89, or that he was dead when plea pleaded, *Carth.* 170-1, 3 *Lev.* 290, 2 *T. R.* 479, or that the contract was several as well as joint.

But it is no answer to show that the party not joined was a bankrupt and obtained his certificate, 2 *M. & S.* 23, 444, 6 *Taunt.* 179, 4 *Taunt.* 326; or an infant, if the contract be merely voidable, 4 *Taunt.* 468; or that partners amongst themselves stipulated that the deft. only should be sued: 3 *B. & A.* 611; 1 *H. Bla.* 236.

Plt. should be prepared to prove his damages in case issue should be found for him, *ante*, 9.

PENDENCY OF ANOTHER ACTION.

*When it may be pleaded*, 17.

*Forms in*, 18.

*Notes on Forms*, 18.

*Evidence*, 18.

*When it may be pleaded.*] The pendency of another action against the same parties, for the same cause, may be pleaded in abatement, *Com. D. Abt. H.* 24, but not in bar, 5 *B. & A.* 101, except at the suit of an informer, *Say.* 216, *Tidd*, 989; and it is said, if two suits are brought on the same day for the same cause, their pendency may be pleaded reciprocally the one to the other: *Hob.* 128; *Mo.* 864-5; *Com. D. Abt. H.* 24. It may be pleaded, whether the suit be depending in the same or a different court, 5 *Co.* 62, a.; but not so to an action brought in the superior courts at West., where the other action is in an inferior court: *ib.*; *Dyer*, 92, 3; *Fitzg.* 313. It may be pleaded, though the actions be of a different nature: *Bac. A. Abt. m.*, *sed quære*. It is said that this plea is improper where the former suit was a real or personal one; where no certainty of description is required in the suit, and the plt. did not make a plaint or declaration, as it does not appear that it is the same suit; the reasons, however, seem unsatisfactory: see *Com. D. Abt. H.* 24; *Bac. Ab. Abt. M.*; 5 *Co.* 61, b.; *sed vide* 3 *Chit. Pl.* 904, n.; 6 *T. R.* 307; 1 *Saund.* 92, n. 2. It is no plea that another action is depending for the same cause, at the suit of another person, 2 *T. R.* 512, *Com. D. Abt. H.* 24; as to an action at the suit of assignees of a bankrupt, that a former action by bankrupt is pending, 4 *B. & C.* 920, or against another person, *Hob.* 137, or against deft. jointly with others, *Com. D. Abt. H.* 24, *Cr. E.* 202, *Carth.* 96, *sed quære*, *Hob.* 137, or to an action at suit of the king, *Th. Dig. l.* 11, c. 39, s. 19; but it is to an action at the suit of a common informer: *Say.* 216; 3 *Bur.* 1423, *supra*. And it has been held at *nisi prius*, that where separate actions have been brought against several defts. for the same single act of trespass, the party against whom the last action was commenced may plead the pendency of the first in abatement: 1 *Camp.* 601; 1 *Chit Pl.* 76.

The plt. cannot, after the plea, avoid the effect of it by discontinuing the first action: 1 *Salk.* 329; 2 *Ld. Raym.* 1014.

\**Form in Pendency of another Action.*

[\*18]

PLEA OF PENDENCY OF ANOTHER ACTION PREVIOUSLY BROUGHT FOR THE SAME CAUSE.

In the K. B. (or C. P.)

—Term, 8 Geo. 4.

(Term of declaration or a subsequent term, with a special imparlance, as ante, 7. If the first action is in the same term as the second, deft. should compel pli. to entitle his second declaration specially in the term.)

*Joseph Styles* } And the said deft. by ———, his attorney, comes and defends the wrong  
                          } and injury (or if in trespass or ejectment, force and injury,) when, &c., and  
*John Hill.* } prays judgment of the said bill (or by original, or C. P., writ and declaration thereon), because he says, that, before the exhibiting of the said bill (or issuing of the said writ), to wit, in ——— term, in the ——— year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the said court then and still being holden at West., in the county of Midx., the said plt. impleaded the said deft., and exhibited

his certain bill against him (or the said plt. sued out his said writ and declared thereon against him), in a plea of debt on demand, of and upon the same identical writing obligatory (or in a certain plea of trespass on the case upon the very same identical promises and undertakings, or in a certain plea of trespass for and in respect of the very same identical trespasses and causes of action), in the said declaration, in this present suit mentioned, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, to wit, at Westr. aforesaid, more fully appears. And the said deft. further saith, that the parties in this and the said former suit are the same, and not other or different persons, and that the supposed causes of action in this and the said former suit are, and each and every of them are, the same and not other or different causes of action; and that the said former suit, so brought and prosecuted against him the said deft., by the said plt., as aforesaid, is still depending in the said court of our said lord the king, before the king himself. And this the said deft. is ready to verify. Wherefore he prays judgment of the said bill (or writ and declaration), in this suit, and that the same may be quashed, &c. (*Add usual affidavit.*)

### *Notes on Forms of Plea, &c.*

*Plea, &c.]* The notes as to pleas in abatement in general will be here applicable. The plea must show that the cause of action in both suits is the same, *Doc. Pl. 10*, whether they are of the same or different forms of action, as *detinue* and *trover*: *Freem. 401*. And, in some cases, the plea must state on what particular day the former action was brought; as, in an action at the suit of an informer, the deft. must show a prior right attached in somebody else, and, if the prior action be brought in the same term, it must be shown on what particular day such prior action was brought, that its priority may be ascertained, *3 Bur. 1423*, *1 W. Bla. 437*, *S. C.*; and so in other cases, where the plea is of another action pending of the same term; *2 Lev. 141*; *2 Str. 1169*. It does not seem essentially necessary to state the declaration in the prior action, *3 Chit. Pl. 904, n.*; nor to aver that such action is still pending, as it is sufficient to abate the second writ to show that it was pending at the time that the second action was commenced: *6 Co. 7*.

*Replication.]* The plt. may reply *nul tiel record* of the former action. If an action pending in the same court be pleaded, plt. may pray oyer, that the record may be inspected by the court, or demand oyer of it, which, if not given in convenient time, he may sign judgment: *Com. D. Abt. H, 24*. Where, to debt on a statute, the deft. has pleaded a prior action depending, or a compromise by the rule of court, &c., plt. may traverse the fact, or reply *per fraudem*: *1 Chit. Pl. 507*.

[\*19]

*\*Evidence in.*

*For Defendant.]* The burden of the evidence lies upon the deft., who must prove the commencement of the former suit, and that it is for the same cause. If the former suit be on record, as, according to some authorities, it ought to be, the record should be produced, or proved in the usual way: *post*, "*Record*." If a writ only has been issued, the same should be proved in the usual way: *post*, "*Process*." If there has been any affidavit of debt, or particulars of demand, or any other legal document or writing, in any way showing the former suit is for the same cause of action, the same should be proved: *post*, "*Affidavit—Particulars of Demand*."

*For Plaintiff.]* Plt. should be prepared with evidence in answer; also to prove his damages, in case the plea should be found for him: *ante*, 9.



## PRIVILEGE AS AN OFFICER TO A COURT.

*When it may be pleaded*, 19 to 20.

*Forms in*, 20 to 21.

*Notes on Forms*, 22.

*Evidence*, 22.

This plea, claiming a privilege of being sued in a particular court, is, as before stated, strictly a plea to the jurisdiction of the court. There are various privileges which may be thus pleaded: such as that deft. is a baron of the Cinque Ports, *Com. D. Abt. D. 5*, a minister, *ib. D. 8*, a tinner, *ib. D. 7*, or scholar of the universities; but the only one of any extent in practice, is that of being an officer of a court, as an attorney.

*By Attorneys.]* If an attorney be improperly sued in a court of which he is not an attorney, he must plead his privilege, 11 *Mod.* 168, 2 *Bulst.* 207, *Lutw.* 195, 639; and he cannot take advantage of it upon motion only, 1 *Wils.* 306, 2 *Salk.* 544, 1 *Arch. P.* 48, 24, 2 *ib.* 118, 9, *sed vide Tidd*, 76; unless, indeed, he be sued in an inferior court, in which case a writ of privilege may be issued to relieve him: *Tidd*, 76. If an attorney be sued in his own court by improper process, he can only plead his privilege in abatement; unless he be arrested, when the court will discharge him on common bail: *Tidd*, 76. Suing a person who is not an attorney, as an attorney, does not appear to be ground for plea in abatement, but is irregular: 5 *M. & S.* 324; 6 *B. & C.* 77; 2 *Chit. R.* 396.

In some cases, an attorney cannot plead his privilege; as, where both he and plt. are attorneys of different courts, and the plt. sues him in the court of which plt. is an attorney, for plt.'s privilege prevails: 1 *W. Blac.* 19, 2; *ib.* 1325; 4 *D. & R.* 73. And, as his privilege extends only to actions in *his own right*, he cannot plead it when sued in *autre droit*, as executor, &c., 1 *Salk.* 2, 7, *Raym.* 533, or sued jointly with unprivileged persons, even his wife, and though the nature of the action be not absolutely joint, 1 *Taunt.* 254, 1 *Vent.* 298, 2 *Salk.* 544, 2 *Rol.* 580, 4 *Bac. Ab.* 223, or is in prison for debt, 4 *B. & A.* 88, or has left off practice, 2 *Wils.* 232, 7 *T. R.* 25; but the omitting to take out his certificate, unless for a year, does not deprive him of his privilege: 5 *M. & S.* 281. He also loses his privilege by appearing to the action, if he be an attorney of the court in which he is sued, or by not pleading his privilege, if he be sued out of his own court: 2 *W. Bla.* 1088; 2 *ib.* 231; *Barn.* 53. If he be arrested and bailed in one suit, he may plead his privilege to another action brought against \*him [\*20] in the same court: *Carth.* 377. An attorney in an action at suit of the king loses his privilege, 2 *Rol. Ab.* 274; but not in an action *qui*

*tam*, 2 *Salk.* 543, nor in an action jointly against him and a privileged person, 4 *M. & S.* 585, nor in an action on a bill of exchange: 2 *Chit. R.* 63; 1 *Doug.* 312.

*Other Officers.*] These rules also apply to other officers of the courts. Thus if the filacer, 2 *Salk.* 544, or prothonotary, or any of his clerks, *Str.* 548, 705, *For.* 344; or warden of the Fleet, 1 *Salk.* 1, or the like, be impeaded out of their own court, they may plead their privilege. So a clerk in the exchequer, if sued in the K. B. or C. P., may plead his privilege: *Lutw.* 44; 6 *Mo.* 305. So one of the six clerks, or of the sixty clerks in chancery, if sued out of his court, may plead his privilege: 20 *H.* 6, 32 *b.*; 1 *Vent.* 264; *Bro.* 498; *see form*, 8 *T. R.* 631. So, if a sergeant at law be sued in any other than the courts at Westr., he may plead his privilege: 2 *Lev.* 129; 2 *Mod.* 297; *Com. D. Abt. D.* 6.

### Forms of Pleas of Privilege.

PLEA OF PRIVILEGE, BY AN ATTORNEY OF THE C. P., TO AN ACTION BROUGHT AGAINST HIM IN THE K. B. BY BILL, AS A COMMON PERSON.

In the K. B. Term, 8 Geo. 4.  
*John Hall, gent.,*  
*one of the attorneys, &c.* } And the said deft., in his own proper person, comes and defends  
 ats. } the wrong and injury, &c. (or in trespass or ejectment, the force and  
*Joseph Styles.* } injury, &c.), and saith, that he, the said deft., long before, and at  
 the time of the exhibiting of the bill of the said plt., was, and  
 from thence hitherto hath been, and still is, one of the attorneys of the court of our lord the king, of the bench, to wit, at Westr., in the county of Midx. aforesaid; and that he, the said deft., during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend, divers pleas and suits in the said court of the bench at Westr. aforesaid, for many true and faithful subjects of our said lord the king, as their attorney; and the said deft. further saith, that he, and all other the attorneys of the said court of the bench prosecuting and defending suits and pleas therein for their clients, have been, and ought, according to the custom of the said court, and the privilege of such attorneys, to be exempt from being compelled to answer any plea or plaint, in any action personal, (pleas of freehold felony and appeals only excepted), before any justices or ministers of our lord the king, or other judge whomsoever, in any court whatsoever, except before the justices of our lord the king, of the court of the bench at Westr. aforesaid, by bill filed in the said court, against such attorney or attorneys as present here in court; and this he is ready to verify. Wherefore he prays judgment, if he ought to be compelled to answer to the said plt. in the said plea in the said court here.

PLEA OF PRIVILEGE OF AN ATTORNEY OF K. B., SUED IN THAT COURT BY LATITAT.

In the K. B. Term, 8 Geo. 4.  
*John Stiles, gent.,*  
*one of the attorneys, &c.* } And the said deft., in his own proper person, comes and prays  
 ats. } judgment of the bill of the said plt., because he says that he, the  
*John Nokes.* } said deft., long before the exhibiting of the bill of the said plt.  
 against the said deft., and at the time of exhibiting the same, was, and still is, one of the attorneys of the court of our said lord the king, before the king himself, as aforesaid; and that he then was, and now is, prosecuting and defending many pleas and suits for many true and faithful subjects of our lord the king, in the said court of our said lord the king, before the king himself, as their attorney; and the said deft. further says, that he, and all others the attorneys of the said court of our said lord the king, before the king himself, by an ancient and laudable custom, used and approved of according to the laws and customs of the realm, and the liberties of the same court of our said lord the king, before the "king himself, have been, and ought to be, in all personal suits, at the suit of any subject of our said lord the king, impeaded only by bill exhibited in the said court of our said lord the king, before the king himself, against such attorneys respectively, as being present in the same court, in their own proper persons, and not as being in the custody

of the Marshalsea of our lord the king, before the king himself; and this he, the said deft. is ready to verify. Wherefore, because he, the said deft., is not impleaded in this action as one of the attorneys of the said court of our said lord the king, before the king himself, he, the said deft., prays judgment, whether he ought to be compelled to answer the said bill, &c.

PLEA OF PRIVILEGE, BY ATTORNEY OF C. P. WHEN SUED IN HIS OWN COURT, BY ORIGINAL.

In the C. P.

*John Stiles, gent.,*  
one of the attorneys, &c.  
ats.

*John Nokes.*

And the said deft., in his own proper person, comes and says, that he ought not to be compelled to answer the said original writ, because, he says, that he is, and on the same day of suing out of the said original writ, and long before, was, one of the attorneys of the court of the lord the king, of the bench here; and that, in the same court here there is, and from time whereof the memory of man is not to the contrary, there hath been, a custom used and approved of in the same court, that no attorney of the said court hath, against his will, been compelled to answer any person in any personal action prosecuted in the same court here, by original writ sued out, which have not concerned the king, unless he hath been first forejudged from his office of an attorney of this court, upon a bill exhibited here to the justices of the said lord the king of the bench against such attorney, and filed in the same court; and the said deft., in fact, saith, that he hath not been forejudged from his office of an attorney of this court, and that he is impleaded by the original writ aforesaid, against his will, and against the custom aforesaid; and this he is ready to verify. Wherefore, as the said deft. is an attorney of the said court here, and, on the day of suing out the said original writ, and long before, was an attorney of the said court here, the said deft. prays his privilege aforesaid to be allowed and adjudged him; and that he may not answer the said original writ for the cause aforesaid.

— Term, 8 Geo. 4.

REPLICATION, TO A PLEA OF PRIVILEGE BY AN ATTORNEY, THAT HE NEGLECTED TO OBTAIN HIS CERTIFICATE OF HIS BEING ENROLLED, ACCORDING TO 37 G. 3, C. 90, S. 31, ETC.

In the K. B.

*John Nokes*  
v.

*John Styles.*

And the said plt. saith, that, notwithstanding any thing by the said deft. in his said plea above alleged, he, the said deft., ought to be compelled to answer the said original writ, because, he says, that before, and on the 16th of Nov., A. D. 1826, and from thence for the space of one whole year then next following, the said deft. was a person admitted, sworn and enrolled as an attorney, in the said court of our said lord the king, of the bench; and that the said deft., so being a person sworn and enrolled as such attorney as aforesaid, from and after the 16th day of Nov., A. D. 1825, did neglect to obtain his certificate thereof, in the manner directed in and by a certain act of Parliament made and passed in the 37th year of the reign of his late majesty, King George the Third, entitled, An Act for granting to his Majesty certain Stamp Duties on the several matters therein mentioned, and for better securing Duties on Certificates to be taken out by Attorneys, Solicitors, and others, practising in certain Courts of Justice in Great Britain, and of a certain other act of Parliament made and passed in the 54th year of the reign of his said late majesty, and for the space of one whole year, to wit, at London. Whereby, and by force of the said acts of Parliament, the admission and enrolment of the said deft. in the said court, &c. as such attorney as aforesaid, became, and was, and from thence hitherto hath been, and still is, null and void; without this, that the said deft. now is, or on the day of issuing out the said original writ of the said plt. was one of the attorneys, &c. present here in court, in his own person, in manner and form as he, the said deft., hath above alleged; and this he, the said plt., is ready to verify. Wherefore he prays judgment, and that the said deft. may be compelled to answer the said original writ, &c.

— Term, 8 Geo. 5.

*Notes on Form of Plea, &c.*

[\*22]

*Plea.*] The general notes, as to pleas to the jurisdiction and in abatement, will here apply: *ante*, 3 to 5. If a bill be filed against an attorney in *vacation*, he may plead within the first four days of the ensuing term without a special imparlance: 1 *Chit. R.* 704; 2 *Saund.* 2; & *ante*, 3. A plea of privilege in K. B. will be received after appearance and bail, *Bunb.* 113; but it cannot be pleaded after imparlance, 2 *Show.* 145, or after he has been forejudged: *Barn.* 41. The plea should be



pleaded in person, and not by attorney, 1 *Lutw.* 7, 6 *Mod.* 146; nor more than half defence must be made: *Co. L.* 127, b. It is not unusual to commence the plea with a prayer, "*that the court ought not to take cognizance,*" &c.; but this seems unnecessary: 3 *T. R.* 186; *Gilb. C. P.* 309; 8 *T. R.* 631. It must be stated deft. was an attorney of the court at the time of exhibiting bill, or issuing writ: 1 *Salk.* 1; 2 *Str.* 864; 2 *Ld. Raym.* 1567. The allegation as to the custom of the court is usual; but it is sufficient for the deft. to plead that he is an attorney of this court, and, as such, to claim his privilege not to be sued by "original;" for we will take notice that he can "only be sued by bill:" *p. Ld. Ellenb., Stokes v. Mason*, 9 *East*, 426. Therefore, a mistake in the statement of the custom does not seem material: 9 *ib.* 339; 2 *Lutw.* 1606. No venue need be stated: 2 *Ld. Raym.* 1172-3; 2 *Salk.* 545. The deft. may plead with a *profert* of his writ of privilege, and the plt. cannot deny the privilege, but must plead *nul tiel record*: 1 *Ld. Raym.* 336; *Com. D. Abt. D.* 6. The conclusion of the plea of privilege by an attorney is, in some of the precedents, thus: "Wherefore he prays judgment if the said court of our said lord the king, before the king himself, now here, will or ought to take cognizance of the said plea," 3 *Chit. Pl.* 896; but it seems to be good both ways: 1 *Salk.* 298; 5 *Mod.* 145; *Carth.* 363; 12 *East*, 544-5.

*Affidavit.*] It seems doubtful whether it is absolutely necessary to add the usual affidavit: 2 *B. & P.* 397; 1 *Chit. Pl.* 401.

*Replication.*] Plt. may reply to the plea by traversing, or confessing and avoiding it. The plt. cannot traverse the custom, the same being matter of law: 2 *Salk.* 543; *Com. D. Abt. D.* 6. A replication in debt to a plea of privilege as an attorney of C. P., that, for five years before, the deft. had not prosecuted or defended any suit, is bad, 2 *Lutw.* 1664. In a replication, that an attorney of C. P. consented to be sued in K. B., if no venue be laid, it is bad: 1 *Salk.* 4; 2 *Ld. Raym.* 898-9.

### *Evidence.*

*As to which party is to begin, see ante*, 8.

*Proof for Defendant.*] Deft. may prove himself to be an attorney either by producing the original roll, signed by the party on his admission, together with the proof of his signature, or by means of an examined copy; or he may prove it by the entry in the book of the chief clerk, kept in the Master's office, into which the names of all attorneys are copied, by the chief clerk, from the original roll: *see* 1 *Tidd*, 61; *R. v. Crossley*, 2 *Esp. Rep.* 526; *Lewis v. Walter*, 3 *B. & C.* 138, n. b., 4 *D. & R.* 810, s. c.; *Jones v. Stevens*, 11 *Price*, 251.

*Proof for Plaintiff.*] In answer to the plea, plt. may prove deft. is in custody for debt, 4 *B. & A.* 88, 2 *Str.* 837, or has left off practising, 2 *Wils.* 232, 7 *T. R.* 25, or has neglected to take out his certificate for a year, *Skirrow v. Tagg*, 5 *M. & S.* 281 (and this must be proved strictly), 5 *B. & C.* 38, or that he became an attorney after the com-

mencement of the action, *Smith v. Bower*, 3 T. R. 662, or matter of estoppel.

Plt. should be prepared to prove his damages, in case plea should be found for him: *ante*, 9.



ACCORD AND SATISFACTION.

[\*23]

ACCORD is a satisfaction agreed on between the party injuring and the party injured, which, when performed, is a bar of all actions upon that account; 3 *Bla. Co.* 15.

HOW DEFENDANT MAY AVAIL HIMSELF OF, 23 to 24.

FORM OF PLEADINGS—

*Plea*, 24.

*Replication*, &c. 24.

PRECEDENTS—

*Plea of in Assumpsit by Delivery of Goods*, 25.

*Delivery of negotiable Security*, 25.

*in Debt*, 25.

*in Covenant of a Sum of Money given*, 25.

*in Trespass*, 26.

*Replication, denying Delivery or Acceptance*, 26.

*denying Delivery of Promissory Note*, 26.

EVIDENCE FOR DEFENDANT—

*In General*, 26.

*Satisfaction must be reasonable and complete*, 26 to 27.

*Specialty or Record*, 27.

*Bill of Exchange, &c. given*, 28.

*must be certain*, 28.

*must be executed*, 29.

*by and to whom made*, 29.

EVIDENCE FOR PLAINTIFF, 29.

*How Defendant may avail himself of.*

The plea may be pleaded specially in assumpsit, or debt on simple contract specially, or given in evidence under the general issue: *Tidd*, 705; 1 *Ld. Raym.* 566: In an action on the case, it may be given in evidence under the general issue: *Lane v. Applegate*, 1 *Stark.* 98; 3 *Bur.* 1353; *Martin v. Thornton*, 4 *Esp. Rep.* 181. In trespass, it must be specially pleaded: 3 *Bur.* 1353; *Doe d. Hill v. Lee*, 4 *Taunt.* 459. So, also, in actions on specialties, and in actions of covenant, *Co.*

*D. Pl.* 2 *V.* 13, *Sham v. Farrington*, 1 *B. & P.* 640, 8 *Taunt.* 277, 1 *Moore*, 460, *s. c.*, 7 *Price*, 604, and in all cases, if made after action brought: see *Francis v. Crywell*, 5 *B. & A.* 886; *Lee v. Levy*, 4 *B. & C.* 390. It cannot be pleaded to an action on a record: 4 *Moore*, 165. This plea may be pleaded with the general issue and other pleas: *Ste. Pl.* 293; *Chitty v. Hume*, 13 *East*, 256. When it is not necessary to plead it, inasmuch as, from the nature of the defence, the plt., in his replication, can in general merely traverse or deny the same, [\*24] and the issue is not, therefore, capable \*of being narrowed, so as to afford the deft. any advantage by pleading it specially, it is rarely so pleaded: *Chit. Con.* 288. When a negotiable or other security has been given, it is best to plead it. The court will not permit this plea to be pleaded as a sham plea, for the purpose of delay: see *Rickle v. Proone*, 1 *B. & C.* 286; 2 *D. & R.* 661; *Blewitt v. Marsden*, 10 *East*, 237. *Sed quære*, see 1 *Chit. Pl.* 449. See, also, *Philips v. Bruce and others*, 6 *M. & S.* 134; *Draycote v. Pilkington*, 5 *M. & S.* 518.

### *Form of Pleadings.*

*Plea.*] The plea must be framed so as to afford a complete answer to the whole of the demand it professes to answer: *Thomas v. Heathorn*, 2 *B. & C.* 477; 2 *Chit. R.* 303. The safest way is to plead it as a satisfaction, and not to state the accord and agreement, *Co. D. Acd. c.*; the plea must allege the *delivery*, *Steph. Pl.* 236, and set out what the deft. gave in satisfaction: it seems unnecessary to allege the satisfaction to be reasonable, according to the *dictum* in 1 *Str.* 426, which was overruled, *Heathcote v. Crookshank*, 2 *T. R.* 26, *a.*; nor does it seem generally necessary or advisable to allege the value of the satisfaction: *Steph. Pl.* 235; 3 *Chit. Pl.* 925, *n. a.* It must be expressly averred that the goods were *accepted* in satisfaction and discharge; and an averment that they were given in payment and satisfaction is insufficient: *Drake v. Mitchel*, 3 *East*, 256, 8; 1 *Str.* 573. If the plea profess to answer the whole demand, but apply to part only, it will be fatal on demurrer, 1 *Saund.* 28, *n.* 3; therefore, if, in assumption on *several promises*, deft. allege satisfaction "of the cause of action," it is bad, "being only an answer to one of the causes of action:" *Hopkinson v. Tahourdin*, 2 *Chit. Rep.* 303; *Willes*, 55; *Thomas v. Heathorn*, 2 *B. & C.* 477; 3 *D. & R.* 647, *s. c.*

If the plea be of a bill, a note or security given in satisfaction, or on account, it should be pleaded only to the amount of the sum contained in such bill, note, or security, or allege that deft. was found indebted in that sum, and "no more:" *Thomas v. Heathorn*, 2 *B. & C.* 481. The correct way of pleading is to say, as to all the sums of money except £—, non assumpsit; and then, as to that sum, that the bill was accepted. If the accord and satisfaction took place after action brought, the plea must aver, and it must be proved, that it was a satisfaction of the costs and damages sustained by the breach of contract: *Francis v. Crywell*, 5 *B. & A.* 886; 1 *D. & R.* 546, *s. c.*

*Replication.*] It may either deny the delivery of the chattel in satisfaction, or, protesting against that fact, may deny the acceptance, *Steph. Pl.* 236; but, where the receipt is confessed, the acceptance should not be traversed: 1 *Ld. Raym.* 60. If the deft. plead that he delivered a bill or note in payment, plt. may traverse the plea; or, admitting it, show that the bill or note has been dishonoured: *Kearslake v. Morgan*, 5 *T. R.* 513. Where the defendant, in his plea, states that the chattels or money were accepted in satisfaction only of the promises in the declaration, before the exhibiting of plaintiff's bill, the plt. may reply, and set out a writ issued prior to the exhibiting plt.'s bill, whereby deft. became liable to the costs thereof: *Francis v. Crywell*, 5 *B. & A.* 888. In replying to a plea of accord and satisfaction in trespass, plt. may deny the accord, or state it to be for another trespass, and traverse the acceptance in satisfaction; or he may reply, that deft. was guilty after the accord: *Co. D.* 3 *M.* 13. (*Sed quære*, if the plt. ought not in such case to new assign: *Chit. Pl.* 518, *a.*) Where, to a plea of accord and satisfaction, the replication denies that the plt. received the property in satisfaction, it must conclude to the country: 1 *Saund.* 103, *c. n.*

*Precedents.*

[\*25]

PLEA OF ACCORD AND SATISFACTION IN ASSUMPSIT, BY DELIVERY OF GOODS.

(Commencement of plea as usual; see post, title "Assumpsit.")

Because he says that, after the making of the said several promises and undertakings, and the accruing of the several causes of action in the said declaration mentioned, and before the exhibiting of the bill of the said plt. against him, the said deft. in this behalf (or if by original, or in *C. P.*, before the commencement of this suit); to wit, on, &c., at, &c. aforesaid, he, the said deft., delivered to the said plt. one ton weight of Riga hemp, and one hundred weight of Russia tallow, in full satisfaction and discharge of the several promises and undertakings and causes of action in the declaration mentioned, and of each and every of them; and which said ton Riga hemp, and said hundred weight of Russia tallow, he, the said plt., then and there accepted and received, of and from the said deft., in full satisfaction and discharge of the several promises and undertakings and causes of action in the said declaration mentioned, and of each and every one of them. And this, &c. (*Usual verification, see post, title "Assumpsit."* If the plaintiff pleads also the general issue, see the form, post, title "Assumpsit.")

PLEA OF ACCOUNT STATED, AND DELIVERY OF DEFENDANT'S PROMISSORY NOTE.

And the said deft., as to the sum of £— (the amount of bill), parcel of the said several sums in the said declaration mentioned, says, that the plt. ought not to have or maintain his action thereof against him, because he says that, after the making of the said promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plt. against him, the said deft., in this behalf (or, if in *C. P.* or by original, before the commencement of this suit); to wit, on, &c., at, &c. aforesaid, an account was had and stated, by and between the said plt. and deft., of and concerning the said several sums of money in the said declaration mentioned, and upon that occasion he, the said deft., was then and there found in arrear and indebted to the said plt., in the sum of £—, for which said sum of £—, he, the said deft., then and there made and delivered to the said plt., his certain promissory note, in writing, bearing date a certain day and year therein mentioned; to wit, the day and year last aforesaid; whereby he, the said deft., promised to pay to the said plt. or his order, three months after the date thereof, the said sum of £—, wherein he, the said deft., was so found in arrear and indebted to the said plt., as aforesaid; and the said plt., then and there accepted and received the said promissory note, for and on account of the said sum of £—, parcel of the said sums of money in the said declaration mentioned; and, by reason thereof, he, the said deft., then and there became, and still is, liable to pay the said sum of £—, in the said promissory note mentioned, according to the tenor and effect of the said note. And this, &c. (*Conclude as usual, post, "Assumpsit."*)

## THE LIKE IN DEBT ON SIMPLE CONTRACT.

*Same as the above, except, instead of saying, after the making of the several promises and undertakings, say, after the accruing of the said debt, and stating the satisfaction to be of the debt, instead of promises and undertakings, with the usual commencement and conclusion in debt: post, title "Debt."*

## THE LIKE IN COVENANT.

*(Commencement as usual, see post, "Covenant.")* Because he saith, that he, the said deft., before the commencement of this suit, to wit, on, &c., at, &c. aforesaid, paid to the said plt. the sum of £—, in full satisfaction and discharge of the said sum of £—, in the said breach of covenant mentioned, and of all the damages by the said plt. sustained, by reason of the non-payment thereof, which said sum of £—, the said plt. then and there accepted and received of and from the said deft., in full satisfaction and discharge of the said sum of £—, in the said breach of covenant mentioned, and of the damages of the said plt. by him sustained, by reason of the said breach of covenant. And this, &c. *(Conclude with a verification, post, "Covenant;" see the form, 3 Chit. Pl. 1002.)*

## PLEA OF ACCORD AND SATISFACTION IN TRESPASS.

[\*26] *\*(Action on, as usual, see "Trespass.")* Because he says, that, after the committing of the said trespasses, as aforesaid, and before the exhibiting of the bill of the said plt. against him the said deft. in this behalf *(or if in C. P. or by original, before the commencement of this suit)*, to wit, on, &c., at, &c. aforesaid, he, the said deft., paid to the said plt. the sum of £—, of lawful money of Great Britain, for and in full satisfaction and discharge of the said trespasses in the said declaration mentioned; and which said sum of £—, he, the said plt., then and there accepted and received of and from the said deft., in full satisfaction and discharge of the said trespasses, and each and every of them, &c. *(Usual conclusion: see "Trespass;" for the general issue, see id.)*

## REPLICATION TO A PLEA OF, IN ASSUMPSIT.

And the said plt. says, that, by reason of any thing in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said deft., because he says that he, the said plt., did not accept *(or, if there has been no delivery whatever, that he, the said deft., did not deliver)*, the said one ton of Riga hemp and the said one hundred weight of Russia tallow, in full satisfaction and discharge of the said promises and undertakings and causes of action, and of all the sums of money in the said declaration mentioned, in manner and form as the said deft. hath above alleged. And this the said plt. prays may be inquired of by the country, &c.

## REPLICATION TO PLEA OF DELIVERY OF, PROMISSORY NOTE, DENYING THE DELIVERY.

And the said plt. *(precludi non, as before.)* Because he says, that the said deft. did not make and deliver to him, the said plt., the said supposed promissory note in the said plea mentioned, for and on account of the said sum of £—, parcel of the said several sums of money in the said declaration mentioned, and the said several promises and undertakings relating thereto; nor did the said plt. take or receive of and from the said deft. the said promissory note, for and on account of the same sum of £—, and the said promise and undertakings relating thereto, in manner and form as the said plt. hath above, in his said plea in that behalf, alleged. And this the said plt. prays may be inquired of by the country, &c. *(If a good note or bill has in fact been given, plt. should then reply the non-payment.)*

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Evidence for Defendant.

*In General.]* The affirmative of the issue lies on the deft., if plt. take issue directly on the plea; but, if he allege new matter in his replication, it is otherwise. In order to support this defence, deft. must prove the agreement between him and plt. to accept the satisfaction, and that such satisfaction was reasonable, perfect, certain, and executed, *Heathcote v. Crookshanks*, 2 T. R. 26, 9 Rep. 79, and proceeded from the deft.: *Edgcombe v. Rodd and others*, 5 East, 294; 1 Smith, 515; *Cro. El.* 541. The delivery of the goods, specialty, or bill, &c. must be proved, unless, indeed, the accord and satisfaction be pleaded specially,

and plt. does not deny the delivery, but merely the acceptance in satisfaction. It must be proved the delivery was as a satisfaction for the cause of action stated in the declaration, unless plt., in his replication, admit the delivery in satisfaction. If a bill or specialty be given, it should be proved, unless admitted by the replication: see "*Bills of Exchange*," — "*Deeds*." The following rules will show as to what is necessary to constitute this a defence.

*The Satisfaction must be a reasonable and complete Satisfaction* of the thing demanded, and operate as an extinguishment of the original cause of action. Therefore, acceptance of a less cannot be a satisfaction, in law, of a greater sum, unless there be a release or some consideration for "the relinquishment of the residue, *Fitch v. Sutton*, [\*27] 5 *East*, 231, *Walker v. Seaborn*, 1 *Taunt.* 526; and this, though an additional security be given, 1 *Str.* 426. "An agreement between a debtor and creditor, that part of a larger sum due should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole debt. But then the legal effect of such an agreement must be considered to be the same as if the whole debt had been paid, and part had been returned as a gift to the party paying," per *Holroyd, J., Thomas v. Heathorn*, 2 *B. & C.* 481, 2, 3 *D. & R.* 647, *s. c.* See *infra*.

But payment and acceptance of a part of a debt, before the time it becomes due, or at a place where it was not payable, in satisfaction of the whole, may be a sufficient satisfaction: *Co. L.* 212, *b.* So, if a third person guarantee the payment of the less sum, *Steinman v. Magnus*, 11 *East*, 390; so, if the debtor assign all his effects: *Heathcote v. Crookshanks*, 2 *T. R.* 24. See further, as to composition, *post*, title "*Composition*."

And so if the debtor give a chose in possession for a chose in action, as a horse, or other property in specie, *Heathcote v. Crookshanks*, 2 *T. R.* 24, *Co. L.* 212, *b.* Destroying certain documents upon plt.'s undertaking, in consideration thereof, not to bring an action for slander, is a sufficient consideration, *Lane v. Applegate*, 1 *Stark.* 97. Conferring a benefit to a third person, at the debtor's request, is sufficient: *Skin.* 391. So where *A.* owes *B.* £100, and *B.* owes *C.* £100, and the three meet, and it is agreed between them that *A.* shall pay *C.* £100, the payment of *B.*'s debt would be sufficient: *Tatlock v. Harris*, 3 *T. R.* 180; *Wilson v. Copeland*, 5 *B. & A.* 228; *Wharton v. Walker*, 4 *B. & C.* 163, 6. But, where *J. C.*, being indebted to *S.*, and *R. C.* being indebted to *S.* and also to *J. C.*, it was verbally agreed between the three, that *S.* should transfer the debt due to him, from *J. C.* to *R. C.*, and *S.*, in pursuance of such agreement, delivered to *R. C.* an account, in which he, *R. C.*, was charged with the debt due from *J. C.* to *S.*, it was held that such rendering of account amounted at most to an accord, but not a satisfaction: *Cuxon v. Chadley*, 3 *B. & C.* 591. And where it was agreed, in an action on a bill, that deft. should renew the bill, and give a warrant of attorney as security, which he did, omitting to pay the costs it was held not to be a satisfaction, and that the plt. might render the bill available: *Norris v. Aylett*, 2 *Camp.* 329.

It is said that a release of an equity of redemption is not a sufficient satisfaction, 2 *Wils.* 86; nor is an agreement that the parties should be quit of actions against each other: 1 *Rol. A.* 128, l. 40; *Com. D. Acc. B.* 1. But, if either party has done any act which would deprive him of his right of action, it would operate as a satisfaction: *Lane v. Applegate*, 1 *Stark.* 97. "Payment after the day is good, by way of discharge, but not of satisfaction:" p. *Holroyd, J., Francis v. Crywell*, 5 *B. & A.* 888, citing 4 *Mod.* 250. The mere fulfilment of an act which a party is bound to do, is no satisfaction: *Edgewcombe v. Rodd and others*, 5 *East*, 302. A deed before breach cannot be discharged by accord and satisfaction without a deed, *Kaye v. Waghorn*, 1 *Taunt.* 428, *Com. D. Ple.* 2, v. 8; but it may after breach: *Com. D. Acc. A.* 1, &c.; *Scholey v. Mearns*, 7 *East*, 150; 1 *Moore*, 358, 460. The accord and satisfaction must be before action brought; or, if it be afterwards, it must be proved to have been in satisfaction of the costs and damages, and specially pleaded: *Francis v. Crywell*, 5 *B. & A.* 886; 1 *D. & R.* 346, s. c.

A *Specialty Security*, when co-extensive, operates as a satisfaction of a simple contract debt or security; and is a satisfaction, as the simple contract is merged in the specialty, *Cro. C.* 415, *Bac. A. Debt. G.*; but not if the specialty be void, or be taken merely as a collateral or additional security, and reciting a pre-existing security: *Twopenny* [\*28] v. *Young*, 3 *B. & C.* 210-1; \**Solly v. Forbes*, 2 *B. & B.* 38.

Judgment recovered is, in itself, no satisfaction, *until payment be obtained* upon it: and *Leblanc, J.*, said, "the giving of another security, which, in itself, would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment: *Drake v. Mitchel*, 3 *East*, 259; see "Judgment;" as to composition deeds, see post, "Composition."

A *Bill of Exchange*, or *Promissory Note*, &c. will sometimes operate as an accord and satisfaction. A person, by taking a bill or note in satisfaction of a former simple contract debt, or a simple contract debt created at the time, is precluded from afterwards waving it, and suing the person who gave it him for the original debt before the bill is due: for the taking a bill or note is *prima-facie* evidence of satisfaction, and amounts to an agreement to give the person delivering it credit for the time it has to run: *Stedman v. Gooch*, 1 *Esp. Rep.* 3; *Chit. B.* 95. But plt. may show the bill was not taken in satisfaction, *ib.*; and, if the bill be dishonoured, he may sue for the original debt, or on the bill, *Puckford v. Maxwell*, 6 *T. R.* 53, *Bishop v. Rowe*, 3 *M. & S.* 362, or if the bill be waste paper, as being of no kind of value, 1 *Esp. Rep.* 5, *Chit. B.* 96, or drawn on a person who has no effects of drawer's in hand, and refuses to accept: *ib.*; 12 *Mod.* 517. The taking a bill or note does not prejudice a prior specialty security: 2 *V. & B.* 416.

Proof of an express agreement by a creditor to take a bill or note as payment, and incur the risk of its being honoured, will amount to a payment or satisfaction of the debt, whether the bill or note be afterwards paid or not: *Owenson v. Morse*, 7 *T. R.* 66; *Brown v. Kewley*,

2 *B. & P.* 518. And a bill or note will, in favour of any party to it, who would be entitled to bring an action on paying it, operate as a satisfaction of any debt or demand for which it was given, if the receiver or holder make it his own by laches, *Bayl.* 171, *Bridges v. Berry*, 3 *Taunt.* 190; as, if he do not present it in proper time for acceptance or payment, *Bishop v. Rowe*, 3 *M. & S.* 362, *Soward v. Palmer*, 8 *Taunt.* 279; or binds himself by agreement to allow an extra time for payment, *Tindal v. Browne*, 1 *T. R.* 167, *Sproat v. Mathews*, *ib.* 186, or neglect to give due notice of a failure in the attempt to procure a proper acceptance or payment: unless indeed in any of these cases the bill or note were on an improper stamp: *Bayl.* 172; see also 3 & 4 *Ann. c. 9, s. 7.* And, if the holder or receiver lose the bill, it will, in some cases, be deemed a satisfaction of the debt: *Pierson v. Hutchinson*, 2 *Camp.* 211; *Dangerfield v. Wilby*, 4 *Esp. Rep.* 159; *Chit. B.* 147. *Post*, "*Bills of Exchange.*"

There is a distinction between satisfaction and extinguishment, sometimes essential to be remembered: "as the holder's claim upon a bill or note may be extinguished as to some parties, and remain entire as to others; but, if his claim is satisfied as to any, it is satisfied as to all:" *Bayl.* 267. But a bill or note, to be a satisfaction for a debt, must be equivalent to or larger than the sum due. Therefore, in an action for £1000, and the deft. pleaded that, upon an account stated, he was found indebted in £400; and that he accepted a bill drawn upon him for that sum by the creditor, on account of the several promises, &c., it was held, that the giving a bill for £400 was not, in point of law, a satisfaction for a debt of £1000, and that plt. might recover the difference, *Thomas and another v. Heathorn*, 2 *B. & C.* 477; *Str.* 426; unless there be an additional security given, as an undertaking by a third party: *Steinman v. Magnus*, 11 *East*, 390.

*The Accord must be certain.*] An accord that the deft. shall employ workmen in two or three days, is bad: 4 *Mod.* 88. An accord to pay a \*less sum on the same or at a subsequent day, is bad, [\*29] *Fitch v. Sutton*, 5 *East*, 230; and performance of an uncertain accord will not aid the defect: 3 *Lev.* 189; *Yel.* 184.

*The Accord must be executed.*] An accord must be completely executed before it can produce any legal obligation or effect; and part execution of an accord and tender of the residue is insufficient: 5 *Co.* 79, *b.*; 2 *H. B.* 319; *Walker v. Seaborne*, 1 *Taunt.* 526; *Fitch v. Sutton*, 5 *East*, 280. An accord to do a thing at a future day is good, but it must be executed before action brought: 1 *Roll. A.* 129, *l.* 17. And, where there is an agreement to pay money or deliver goods in satisfaction, it is not sufficient to show that he has always been ready to pay the money, or deliver the goods, or even a tender and refusal; but an actual acceptance thereof by plt. must be proved: 9 *R.* 79; 1 *Ld. Raym.* 122; 2 *N. R.* 148; 3 *East*, 251; *Beatson v. Shank*. If a party agree that the debtor shall pay a sum of money, or perform some act at a future day as a satisfaction, this agreement is not available as a satisfaction before that period: 2 *Keb.* 851; *Co. D. Acc. B.* (4). The performance of one



of two things stipulated for by an accord is insufficient; and, where it was agreed that plt. and deft. should deliver up respectively their parts of an indenture to be cancelled, it was held no satisfaction, though deft. had delivered up his part: 3 *Lev.* 189.

*By and to whom.*] Satisfaction should proceed from the deft.; for, if it be executed by a total stranger, the deft., cannot avail himself of it: *ib.*; *Cro. E.* 541; 1 *Str.* 24. Accord and satisfaction by a copartner is a bar to an action against the others, 9 *Co.* 79, *b.*, 12 *East*, 317; and it seems that acceptance of satisfaction from one joint tort feisor discharges the rest. *Dufresne v. Hutchinson*, 3 *Taunt.* 117; 1 *Chit. Pl.* Accord and satisfaction to one of several coplts. will be so to all: 5 *Co.* 117, *b.*; 13 *Ed.* 4, 6.

### *Evidence for Plaintiff.*

If this defence is set up, or intended so to be, plt. should be prepared to disprove it; and the grounds upon which he may do so, may be collected from the foregoing. In the case of a bill or negotiable security given, he should be prepared to show the dishonour of it, and all the requisites that would entitle him to recover against deft. on such bill, &c.: see post, "*Bills of Exchange.*"



[30\*]

### ACCOUNT STATED.



FORM OF REMEDY ON, 30.

FORM OF PLEADINGS, 30 to 31.

*Declaration*, 30.

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PRECEDENTS—

*Count in Assumpsit on an Account stated*, 31.

*The like in Debt*, 31.

EVIDENCE FOR PLAINTIFF—

*Mode of Accounting*, 31.

*With whom stated*, 31.

*Subject Matter of Account*, 31.

*Effect of*, 32.

EVIDENCE FOR DEFENDANT—



### *Form of Remedy.*

THE form of remedy to recover money due under an account stated, is by an action of debt or assumpsit: *Cro. E.* 654. The difficulty and intricacy of the account makes no difference: 5 *Taunt.* 431.

*Form of Pleadings, &c.*

*Declaration.*] It is advisable in declarations in assumpsit, and in many cases in debt (except in actions against infants), to insert a count on an account stated. And though it is seldom resorted to, except where plt. fails in proving his original and specific cause of action, it frequently secures a verdict. Few observations are necessary on the form of the count. Care must be taken that it meets the evidence. Therefore, in actions by or against executors, &c., where six years have elapsed since the death of the testator, &c., or, if it be on any other account material for the plaintiff to avail himself of a promise or acknowledgment since the death of the testator, &c., a count should be added, on an account stated to or by the executor, &c. in that character; otherwise such promise or acknowledgment cannot be given in evidence: *Sarell v. Wine*, 3 East, 409; *Willes*, 29; 1 *Chit. Pl.* 186, 308. And in an action against *A.*, *B.*, and *C.*, the wife of *B.*, in order to give in evidence a promise by *A.* before the marriage of *B.* and *C.*, to take the case out of the statute of limitations, a count on such promise before marriage must be added: 2 *D. & R.* 363; *Pittam v. Foster*, 1 *B. & C.* 248, s. c. An account stated by the deft. as executor or administrator of moneys due from the testator, &c., may be supported and joined with counts upon promises by the testator or intestate, 2 *Saund.* 117, e.; and a count on an account stated by an executor, as such, of moneys due and owing from him in that character, may be joined with counts on promises by the testator: *Powell v. Graham*, 7 *Taunt.* 580; 1 *Moore*, 305, s. c.; 1 *Chit. Pl.* 187. In an action at the suit of an executor (who is not in general subject to costs in case of his not succeeding), \*unless there be evidence to meet the fact, it is not advisable to insert a count on an account stated with him, the plt., as executor, of moneys due and owing to him as such, as it would subject him to costs: 8 *Moore*, 146; *Jones v. Jones*, 1 *Bing.* 249, s. c.

The precise sum acknowledged to be due need not be stated in the declaration; it suffices to state that the deft. was found indebted in any sum large enough to cover the demand: 2 *Saund.* 122, n. 3.

*Plea.*] There is nothing peculiar relating to the plea, which is usually non assumpsit, or nil debet. See "*Assumpsit—Debt.*"

*Precedents.*

## COUNT IN ASSUMPSIT ON ACCOUNT STATED.

And whereas, also, the said deft. afterwards, to wit, on the same day and year (last) aforesaid, at London aforesaid, in the parish and ward aforesaid, accounted with the said plt. of and concerning divers other sums of money, from the said deft. to the said plt. before that time due and owing, and then in arrear and unpaid; and upon that account the said deft. was then and there found to be in arrear and indebted to the said plt. in the further sum of £—, of like lawful money; and being so found in arrear and indebted as last aforesaid, he, the said deft., in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London, aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said plt., to pay to him the said sum of money last mentioned, whenever afterwards he, the said deft., should be thereunto requested. (*For the breach and conclusions of actions in assumpsit, see "Assumpsit."*)

## COUNT IN DEBT ON ACCOUNT STATED.

And whereas, also, the said deft. afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, accounted with the said plt. of and concerning divers other sums of money before that time and then due and owing, and in arrear and unpaid, from the said deft. to the said plt.; and, upon that accounting, the said deft. was then and there found to be in arrear and indebted to the said plt., in the further sum of £—, of like lawful money, to be paid by the said deft. to the said plt., when he, the said deft., should be thereunto afterwards requested. Whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plt., to demand and have of and from the said deft. the said last-mentioned sum of £—, residue of the said sum above demanded. (*For the conclusions in debt, see "Debt."*)

*See other precedents, post, "Bankruptcy," "Executors," "Husband and Wife."*

## Evidence for Plaintiff.

*Mode of Accounting.]* Any admission of a balance or acknowledgment made by one party to another, that a sum of money is due to the latter, is sufficient *prima facie* evidence to entitle the plt. to recover that sum on an account stated: 2 *Mod.* 44; *Trueman v. Hurst*, 1 *T. R.* 42; *Knox v. Whalley*, 1 *Esp. Rep.* 159; *Dawson v. Remnant*, 6 *Esp. Rep.* 24. Proof that deft. stated that he would call and settle the amount of the debt sent in, is sufficient; *Clarke v. Glennie*, 3 *Stark.* 10. So is proof of his sending £5 on account, and stating that he would pay the remainder next week: *Peacock v. Harris*, 10 *East*, 104. But proof of a mere qualified acknowledgment is not sufficient: *Evans v. Verity*, 1 *R. & M.* 239; *Green v. Davis*, 4 *B. & C.* 235; 6 *D. & R.* 306, *s. c.*

An acceptance of the bill is evidence of an account stated by the acceptor with the holder, 1 *H. B.* 239; *sed vide Taylor v. Higgins*, [\*32] 2 *East*, 169, \**Whitwell v. Bennett*, 3 *B. & P.* 559, *Johnson v. Collings*, 1 *East*, 98; at all events, it is so in an action at the suit of the drawer, *Highmore v. Primrose*, 5 *M. & S.* 65, or at the suit of a payee, who is also drawer: *Rhodes v. Gent*, 5 *B. & A.* 245. A promissory note is evidence as an account stated, in an action by the payee against the maker, 2 *Str.* 719, *Chit. Bil.* 366, especially if it be expressed to be for value received, *Clayton v. Gosling*, 5 *B. & C.* 360, *Highmore v. Primrose*, 5 *M. & S.* 65; but not if improperly stamped: *Green v. Davis*, 4 *B. & C.* 235. An I O U is evidence of an account stated: 5 *M. & S.* 65. Where accounts are submitted to an arbitrator, not by bond, his award may be given in evidence under an account stated, *Kean v. Batshore*, 1 *Esp. Rep.* 194; 1 *Chit. Pl.* 308.

If the account was stated verbally, a witness present should be subpoenaed; if in writing, then the same should be produced, and deft.'s signature proved. If the writing be in the opposite party's possession, a notice should be served on him to produce it, and the service of such notice proved; after which, parol evidence of the contents of the writing would be admissible: *post* "Notices." An acknowledgment of the correctness of an account need not be stamped; *Wellard v. Moss*, 1 *Bing.* 134; 7 *Moore*, 583, *s. c.*; *Jacob v. Lindsay*, 1 *East*, 460.

*With whom stated.]* Proof of an account stated with plt.'s agent is

sufficient; proving the party to be such agent: so plt. may recover on an account stated by the deft. with plt.'s wife, or on an account stated by the deft.'s wife, *B. N. P.* 129; if, indeed, she be proved to be the party's agent. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between B. and C. as partners, and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, it was held the whole might be proved on an account stated in an action by B. and C.: *Pea. Ev.* 273; 4 *Price*, 214; *David v. Ellice*, 5 *B. & C.* 196. If an account be stated between partners, and one partner expressly promise to pay the balance struck, he may be sued at law: *Smith v. Barrow*, 2 *T. R.* 476, 8; *Foster v. Allanson*, *ib.* 482. But this only holds where there is a final balance of all the partnership concerns, and an express promise to pay such balance, *Fromont v. Coupland* 2 *Bing.* 170; *sed vide Rackstraw v. Imber*, *Holt*, 368, *Clark v. Glennie*, 3 *Stark.* 10; and evidence of this must be adduced accordingly.

*Subject Matter of Account.*] With respect to the subject matter of the account, it must be proved to have been of *money* and a *debt*: see 5 *Moore*, 114, 116. It is sufficient, however, to move an account stated, without giving evidence of the several items constituting the account, *Trueman v. Hurst*, 1 *T. R.* 42; *Prouting v. Hammond*, 8 *Taunt.* 688; and it is not necessary that there should be cross demands between the parties, or that the deft.'s admission should relate to more than one item or transaction: *Knowles v. Mitchell*, 13 *East*, 249; *Highmore v. Primrose*, 5 *M. & S.* 65. An admission by the deft. that so much was agreed to be paid to the plt. for the sale of standing trees, made after the trees had been felled and taken away by the deft., will support it: *Knowles v. Mitchell*, 13 *East*, 249. It is most usual to prove some existing antecedent debt or demand between the parties, respecting which an account was stated, and a balance struck: 5 *Moore*, 105; *Green v. Davis*, 4 *B. & C.* 235, 242; 6 *D. & R.* 306, *s. c.*, *Trueman v. Hurst*, 1 *T. R.* 42. *n.* The acknowledgment need not be of a sum certain; but to entitle the plt. to recover more than nominal damages under such an acknowledgment, it would be necessary for him to prove the amount by other means: *Dixon v. Beveridge*, 2 *C. & P.* 109; (*sed vide* 4 *Moore*, 542, where it appears to have been considered plt. could not recover even nominal damages.) In a late case, where the deft., on being applied to for payment of interest, stated he would bring plt., who was an executrix, some money on the following Sunday, [\*33] it was held that, though this was an admission that something was due, still, as it did not appear what the nature of the debt was, or that it was due to plt. as executrix, or in her own right, nor that it was one for which assumpsit would lie, plt. was not entitled to recover even nominal damages: *Green v. Davies*, 4 *B. & C.* 235.

An account stated in some cases will amount to an admission of the title of the party to receive the money: 4 *Moore*, 73, *post*, 49. Accounting with plt. in a particular character, admits that character: *Peacock v. Harris*, 10 *East*, 104, *post*, 46. An account stated does not alter the nature of the original debt: *Aleyn*, 72-3

*Evidence for Defendant.*

For the defence, the deft. may show a gross error or mistake in the accounts, or that he made the account under a misapprehension of facts, for the account stated is not conclusive evidence against him: *Trueman v. Hurst*, 1 T. R. 42; *Skyring v. Greenwood*, 4 B. & C. 281. It has been held at N. P., that where an account for goods sold is settled, and the party gives a bill of exchange for the amount, but which bill is not paid, on an action brought, the party cannot go into evidence to impeach the charges on the first account, which has been settled, *Knox v. Whalley*, 1 Esp. Rep. 159, *post*, 46; and that, where parties, having cross demands, settle and balance their accounts, though part of the plt.'s demand could not have been recovered in an action, the settlement of the accounts shall bind the deft., so that he shall not set up that defence to an action for the balance: *Dawson v. Remnant*, 6 Esp. Rep. 24; 12 Mod. 517, *post*, 46.



## ACKNOWLEDGMENT.

See "ADMISSIONS."



## ACT OF PARLIAMENT.

*Public Acts.*

PUBLIC ACTS are those which relate to all the subjects of the realm, 4 Co. 76, as those which concern the king, or all lords of manors, or all officers in general, or all spiritual persons, or all trades, *B. N. P.* 223; and are presumed to be known to all men as the general law of the land. Some acts are made public acts by an express provision in their enactment. A recital in a public act is evidence of the fact recited: *R. v. Sutton*, 4 M. & S. 532.

*When and how pleaded.*] As the courts take notice of all public acts, it is never necessary to set them out in pleading. It is only necessary for the party availing himself of them, to state those facts which bring his case within them. *Spierres v. Parker*, 1 T. R. 145, 3 Wils. 318, *Clarke v. Harvey*, 1 Stark. 92; and, in general, referring to the act. It is not advisable to recite any part of a public statute, for a misrecital will sometimes be fatal: 1 *Ld. Raym.* 382; *Doug.* 97; *King v. Marsack*, 6 T. R. 776. Where facts have occurred recently after the passing of the act, it is usual to allege them to have taken place subsequent to its enactment: 1 *Saund.* 309, n. 5. But it is unnecessary to allege the time of holding every Parliament, and its prorogations and sessions, or where any Parliament sat, as they will be taken notice of judicially, 1 *Ld. Raym.* 343, *Plowd.* 77, 1 *Lev.*

296; and therefore they should not be stated in pleading, as any misstatement will be bad on demurrer, *ib. Cowp.* 474, 1 *Lev.* 296; and see, further, as to the pleadings on a penal statute, *post*, "*Penal Statute.*"

*Proof of Public Acts.*] As the courts take judicial notice of public acts, and as they are presumed to be known to all men, they require no proof; and the printed books are used as hints of that which is supposed to be in every man's mind, *Gilb. Ev.* 10; however, if the books differ, the mistake may be shown by one examined with the original roll: *Rex v. Jeffries*, 1 *Str.* 446.

By 41 *G.* 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland, prior to the Union, printed by the printer duly authorized, shall be received as evidence of the several statutes in the respective courts of either kingdom.

### *Private Acts.*

PRIVATE ACTS are such as relate to a particular class of men: as to particular officers, 4 *Co.* 76, 2 *Saund.* 155, n., 2 *T. R.* 569; or to particular persons; or particular counties, parishes, or places; or particular trades, as dyers, butchers, grocers: *B. N. P.* 223.

*When and how pleaded.*] As the court will not take judicial notice of private acts, such parts of them as are essential to the party's action or defence must be specially recited in pleading: *Bac. Ab. Stat. l.* 2; 2 *Mod.* 57; *Carth.* 306.

In reciting or pleading the act, the day, the year, and place of making it must be shown; and any misstatement in this respect will be bad, on the plea of *nul tiel record*, or any other plea putting in issue the whole of the facts stated in the declaration, *Cowp.* 474, 1 *Lev.* 296, *Cro. C.* 202; but the mistake may be aided by verdict: 2 *Mod.* 240. It is not necessary to recite the title, *Chance v. Adams*, 1 *Ld. Raym.* 77, or preamble, 6 *Mod.* 62, 8 *Mod.* 144, as they do not constitute a part of the statute: *Bac. Ab. Stat. l.* 3. Yet, if the party undertake to recite the title or preamble of an act, and it be misrecited, it is fatal: 6 *Mod.* 62; 2 *Salk.* 609, *supra*. As to the setting out of the act, it is sufficient to recite so much of it as relates to the subject matter in dispute: *Plowd.* 108, &c.; *Cro. J.* 140; *Doct. Pl.* 332. And, if the party recite so much of a statute as makes for him, it is sufficient, though he omit a proviso containing an exemption, provided it is not incorporated with the enacting clause by any words of reference: *Steel v. Smith*, 1 *B. & A.* 94; *Plowd.* 410; *Ld. Raym.* 120. But the opposite party may avail himself of such proviso in his pleadings: *Cro. J.* 140, and see *post*, "*Penal Statute.*" In reciting a statute, a material variance will vitiate the pleading, as if the act be recited in conjunctive words, where it is disjunctive: *Cro. E.* 96, 697; *King v. Marsack*, 6 *T. R.* 771; *Cowp.* 474; 2 *Bulst.* 47. But a trifling or immaterial variance will not prejudice, 2 *Bulst.* 47, 51, as where the statute is merely in the plural, and the recital in the singular: *Cro. C.* 523. See further, *post*, "*Penal Statute.*"

*Proof of Private Acts.*] It is usual, in most acts of this nature, to insert a clause, with a view to evidence, directing that the act shall be deemed and taken to be a public act, or that a copy by the king's printer shall be admitted in evidence. But, though an act contains no clause of this description, if it be of a general and public nature, it has been ruled at the assizes, that a printed copy may be given in evidence; thus, acts relating to public highways, *Gilb. Ev.* 10, 13; the Act [\*35] of the Bedford \*Levels; the Act for Rebuilding Tiverton; and that concerning the College of Physicians, *ib.*; *B. N. P.* 225; 12 *Mod.* 216. The regular proof of a private act, like that of other records, must be substantiated upon oath, by means of an examined copy compared with the original in the Parliament Office at Westminster, *Gilb. Ev.* 12, 13, *B. N. P.* 225; or by means of an exemplification under the great seal, *ib.*

As to the proceedings in Parliament, and the journals of the House, *post*, "*Public Documents.*" As to actions on penal statutes, *see post*, "*Penal Statute.*"



## ACT OF STATE.

See "PUBLIC DOCUMENTS."



## ACTION.

As to proof of notice of, *see* "NOTICE;"—As to proof of commencement of, *see* "PROCESS;"—As to plea in abatement of pendency of prior action, *ante*, 17.



## ADJUSTMENT.

See "AVERAGE"—"POLICY."



## ADMINISTRATOR.

See "EXECUTOR AND ADMINISTRATOR."



## ADMIRALTY, SENTENCES OF COURTS OF.

*Effect of, in Evidence.*] The final judgment, sentence, or decree of a Court of Admiralty in this country in questions of prize, being a pro-

ceeding *in rem*, is conclusive evidence in all courts and with reference to all persons: *B. N. P.* 244; 11 *St. Tr.* 262; *Kindersley v. Chase, Park, Ins.* 490; *Oddy v. Bovill*, 2 *East*, 473; *Geyer v. Aguilar*, 7 *T. R.* 681. And so all sentences of foreign courts of admiralty, of competent jurisdiction to decide questions on prize, will be received as conclusive evidence of every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they professed to decide judicially: *Hughes v. Cornelius*, 2 *Show.* 232; *Bolton v. Gladstone*, 5 *East*, 160; *Baring v. Clagett*, 3 *B. & P.* 214. Such judgments, &c., whether domestic or foreign, are also conclusive, whether they involve questions as to the right of property, as in trover, or questions arising as to warranty in actions on policies of insurance: *Baring v. R. Ex. Ass. Comp.*, 5 *East*, 99; *Bolton v. Gladstone*, *ib.* 155; 2 *Taunt.* 85, *s. c.*; *Lothian v. Henderson*, 3 *B. & P.* 513; 2 *Show.* 232; 2 *Doug.* 575. And such judgments will be received in evidence, though it appear, from the judgment itself, that the court acted on rules of evidence established by its own particular ordinances, and not arising out of general principles: *ib.* Thus, a sentence condemning [\*36] ing goods as captured from the enemy, is conclusive evidence that they were so captured; and such sentence is conclusive of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers; *Stirling v. Vaughan*, 2 *Camp.* 228. And, where property is condemned on the ground of not being neutral, the sentence is conclusive evidence of that fact: *Barzally v. Lewis, Park*, 469; *Doug.* 554; 7 *T. R.* 523. So, a sentence of a French court, condemning a ship during a war between England and France, is conclusive evidence that she was not Swedish: *Baring v. R. Ex. Ass. Comp.* 5 *East*, 99; *Bolton v. Gladstone*, *ib.* 155; 2 *Taunt.* 85, *s. c.* The condemnation of a ship at Malaga, that she was English, is conclusive that she was not neutral, *Oddy v. Bovill*, 2 *East*, 473. And where a ship is condemned generally as lawful prize, and no special ground assigned, it will be presumed that the sentence proceeded on the ground of the property belonging to an enemy, and the sentence will be conclusive evidence of that fact: *Saloucci v. Woodmass, Park*, 471.

But the sentence of a foreign court is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference: *Fisher v. Ogle*, 1 *Camp.* 418: though, where there is an ambiguity in the sentence, the court will look into the proceedings to ascertain the precise ground of the determination, *Lothian v. Henderson*, 3 *B. & P.* 525. If the facts disclosed on the sentence do not warrant the sentence, it will not be conclusive as to such facts: *Calvert v. Bovill*, 7 *T. R.* 523; 8 *T. R.* 444; *Doug.* 574; *Bolton v. Gladstone*, 5 *East*, 155. The sentence of a court of admiralty, sitting under a commission from a belligerent power in a neutral country, will not be recognised in our courts; *Havelock v. Rockwood*, 8 *T. R.* 268; *Donaldson v. Thompson*, 1 *Camp.* 429.

*Proof of Sentences in English Courts.]* The libel, answer, depositions, and sentence in the Admiralty Court must be proved by examined copies: *Com. D. Ev. C.* 1; *vide post*, "Chancery"—"Record."



*Proof of Proceedings, &c. in Foreign Courts of.]* The decisions of a foreign court are proved by exemplification under the seal of the court, and it must be proved that the seal affixed to the exemplification is the seal of the court; it is not sufficient merely to prove the judge's signature: *Henry v. Adey*, 3 *East*, 221; see further, post, "Record;" nor is a copy by an officer of the court sufficient: 2 *Stark.* 7. The record must be sealed, though the seal be so worn out as not to make an impression: 1 *Stark.* 525. If there be no seal of the court, then, indeed, an examined copy will suffice, proving the court has no seal: 6 *M. & S.* 36. So, if the court verifies its judgments by the signature of the judge, proof of that fact and the judge's signature suffices: 4 *Camp.* 28. Before the sentence of a foreign Court of Admiralty, condemning a ship as prize, can be given in evidence, a foundation for it should be laid by proving the capture of the vessel; the sentence will then be evidence of the facts on which the condemnation proceeded; *Marshall v. Parker*, 2 *Camp.* 69.

## \*ADMISSIONS.

[\*37]

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I. *Nature and Effect of, in General.*

Admissions are of two kinds: conclusive and inconclusive upon the party making them.

*Conclusive* admissions are those arising from matter of estoppel, technically so called: as, admissions by records and specialties, or where the parties agree to make the admission as evidence, or where the admission is made with a view to benefit the party making it, or to prejudice the party to whom made. In equity there is no such thing as *an estoppel*: *Com. D. Estoppel, E. 1.*

A party is never estopped, if there have been any illegal transaction, fraud, or duress to obtain the admission; and courts or juries are not, in general, estopped: *post, 39; B. N. P. 298.*

*Inconclusive* admissions are those where the party making it had no particular object or interest in view, to misstate the truth, and where the admission does not fall within the above principle which makes it a conclusive one. Thus, a receipt for money, or an admission of a balance of an account, is not conclusive, but mere *prima-facie* evidence of such receipt or balance, and the debtor may show the contrary: *see post*, 46.

Admissions made for the purpose of buying peace are not, in [\*38] general, \*evidence: *Gregory v. Howard*, 3 *Esp. Rep.* 113; *B. N. P.* 236; *Waldridge v. Kennison*, 1 *Esp. Rep.* 143; *see post*, 44.

*How construed.*] When the admission amounts to matter of *estoppel*, it should be construed strictly, and not be in any way extended against the party making it; for estoppels in general are not to be favoured, because their tendency is to prevent the investigation of truth; *R. v. Lubbenham*, 4 *T. R.* 254. Matter of estoppel is reciprocal, and binds both parties to it: *see Com. D. Estoppel, B.; Co. L.* 352, *a.*; *Taylor v. Needham*, 2 *Taunt.* 282. An estoppel ought to be certain to every intent, and, if a thing be not directly and precisely alleged, it will not amount to an estoppel: *Co. L.* 303, *a.* 352, *b.*

The whole admission must be taken together, in order to show clearly the meaning of the party; but what credit is to be given to the whole or part, is a question for the consideration of a jury, with whom, perhaps, the assertions of a party in his own favour, may have but little weight, *Randle v. Blackburn*, 5 *Taunt.* 245. Therefore, with respect to the admission of debts, if a party admit that he did owe a debt, but that he has paid it, such an admission could not be received as evidence to prove the debt, as it also proves payment, 12 *Vin. A. Ev. A. b.* 23; for a party's admission of a fact disadvantageous to him shall not be received, without receiving, at the same time, his contemporaneous assertion, not merely as evidence that he made such counter claim, but as evidence of the matter he thus alleged in his discharge: *Randle v. Blackburn*, 5 *Taunt.* 245; *Thomas v. Austin*, 2 *D. & R.* 361. The recitals in a deed, and the operative part of it, must be construed together: *Lampon v. Corke*, 5 *B. & A.* 606; 1 *D. & R.* 211, *s. c.* If a party reads an answer in chancery as evidence, he makes the whole of it evidence: *see 1 Stark. Ev.* 291; 3 *Salk.* 153; *post*, "*Chancery.*" So, if a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shown before the admission can be used as evidence against him: *Jacob v. Lindsay*, 1 *East*, 462; *Smith v. Young*, 1 *Camp.* 440. But, where the plt. reads in evidence an entry from the deft.'s daybook, though deft. is entitled to have the whole of the particular entry read, yet he cannot insist upon reading distinct entries in different parts of the book: *Catt v. Howard*, 3 *Stark.* 3-6. A qualified promise of payment, though an admission of the receipt of due notice of the dishonour of a bill, must nevertheless be taken as a qualified promise, and of itself renders the party liable only to the extent of such promise: *Chit. B.* 239; *Fletcher v. Froggatt*, 2 *C. & P.* 569, *s. c.* If A. demises to B. the herbage of his own land by indenture, B. is, not

estopped from disputing A. had nothing in the land, because the lease was not of the land : *Co. Lit.* 47, *b*.

*Matter of Estoppel should be pleaded.*] It should be here observed, that in general, in order to conclude the party by matter of estoppel, the estoppel should, unless it appear on the face of the record, if practicable, be pleaded ; for, if a party does not rely upon matter of estoppel, as such, the court and jury are not bound by it, and the jury may find the matter at large according to the fact, and the court will give judgment accordingly : *Vooght v. Winch*, 2 B. & A. 662 ; *Hannafoord v. Hunn*, 2 C. & P. 148 ; *Plummer v. Woodburne*, 4 B. & C. 625 ; *Bagot v. Williams*, 3 B. & C. 235 ; 1 *Stark. Ev.* 303. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel. Thus, in debt for rent on an indenture of lease, if the deft. plead *nil debet*, he cannot give in evidence that the plt. had nothing in the tenements, because, if he had pleaded that specially, the plt. might have replied the indenture, and estopped him ; but, if the deft. plead *nil habuit*, &c. and the plt. instead of relying on the estoppel, reply *habuit*, &c., he waves the estoppel, and the jury are to find the truth, notwithstanding the \*in- [\*39] denture : 1 *Salk.* 277 ; *Com. D. Estoppel, C.* ; 1 *Stark. Ev.* 303.

And, showing even the inconsistency of not relying, in pleading, on matter of estoppel when it might be so relied on, cannot in general be material, as a jury can hardly be warranted in finding a verdict contrary to the solemn admission of the party, without the strongest evidence of fraud, &c. : see 1 *Stark. Ev.* 304 ; 2 *Taunt.* 141 ; *Lampon v. Corke*, 5 B. & A. 606.

As to pleading an estoppel by record, *post*, 40.

*Who bound by.*] An admission binds the party making it and all parties privy to it : *post*, 50. Matter of estoppel, strictly so called, is reciprocal, and binds both parties to it : *Co. Lit.* 352, *a.* ; *Cro. E.* 700, 807 ; *Gould v. Barnes*, 3 *Taunt.* 504. But courts and juries are not bound by estoppel. See this head more fully considered, *post*, 50.

*Who may take advantage of.*] A party or his representatives cannot, in general, take advantage of his own admissions, 2 *Ves.* 43, *Rex v. Debenham*, 2 B. & A. 187, *post*, 50 ; nor can a mere stranger to the admission, 1 *Rol.* 868, *l.* 47, *Co. Lit.* 352, *a.* ; but every one who claims under, or is affected by, matter of estoppel, may take advantage of it. See this more fully considered, *post*, 50.

*How determined.*] The effect of an admission may be determined by the other party's act. As, if he should break the agreement or condition upon which the other party agrees to make the admission, or the like : *Hayne v. Maltby*, 3 *T. R.* 441 ; 2 *Saund.* 418, *n.* 1 ; *Gregory v. Howard*, 3 *Esp. Rep.* 113 ; *Peake's Rep.* 5 ; *Evans v. Verity*, *R. & M.* 239. So, if he makes an admission amounting to an estoppel against the other party's estoppel : *Com. D. Estoppel, E.* 9. So an admission amounting to an estoppel may be determined as such estoppel by cesser

of the act or deed, &c. which made the estoppel: as if a tenant for life makes a lease for years by indenture, during his life and the continuance of the lease the tenant is estopped saying he has not the reversion in him, but he being dead, he is not estopped, but may confess the lease, and avoid it in covenant by the heir for not repairing, 2 *Wils.* 143, *Com. D. Estoppel, F.*, and other instances there. An estoppel may be determined by a jury finding the truth of the fact: *Com. D. Estoppel, E.* 10; *B. N. P.* 298.

## II. *Effect of, with Reference to the particular Nature of the Admission.*

*By RECORD.]* A party will be estopped from disputing a fact which he has admitted on a valid record: *Com. D. Estoppel, a.* 1; *B. N. P.* 298.

*Admission in the Record of the particular Suit in Litigation.]* An admission of this nature, when on the record of the particular suit in litigation, is the highest species of admission; and no evidence need be given to prove any facts admitted by the pleadings, nor can be received to rebut such admissions, as the jury are sworn to try only the matter in issue between the parties. Therefore, if a tenant justifies for common, and the issue on the right of common is found for the demandant, the jury cannot find that the tenant did not put in his cattle, for that is admitted: *Com. D. Pleader, S.* 17; *Show*, 28. So, in an action of debt on an award, where the defendant pleads no such award, the jury cannot find matters which make the award void, if they are not contained in the award itself: 2 *Rol. Ab.* 692, *l.* 25. Whatever is pleaded, and not denied, is admitted, *Plowd.* 48, 1 *Rol.* 864, *l.* 15.; "and the general principle is, that a party who puts himself upon one issue, admits all the rest," \**per Lord Ellenb. Corbie v. Oliver*, 1 *Stark.*

77. But, where there are several counts in the same declaration, or several distinct pleas, the language in one count or plea cannot be insisted on by the adversary, to disprove the allegations in another count or plea: *Harrington v. M<sup>r</sup> Morris*, 5 *Taunt.* 233. Thus, in assumpsit by landlord against tenant, where the declaration contains one count professing to be founded on a special written agreement, and a second on an implied contract, the deft. cannot insist upon the first count as evidence that a written contract exists, so as to impose upon the plt. the necessity of producing it to disprove the second count: *per Le Blanc, J.*, cited 1 *Stark. Ev.* 295. Where a defendant confesses, and avoids the count by his plea, he admits every fact stated in the count; and if plt., by his replication, confess and avoid the plea, he admits every fact stated in the plea. The usual protestation will not avail the party: see 1 *Chit. Pl.* 534. Where deft. pleads payment to an action by assignees of a bankrupt, as such, he admits their title: *Corbie v. Oliver*, 1 *Stark.* 76. And, in an action by husband and wife, the plea of general issue admits the marriage: *B. N. P.* 20. So, in assumpsit by administrator upon promises to the estate, the deft., by pleading the general issue, is precluded from objecting to the letters of administration, as not being

properly stamped, for the deft. admitted by his plea that plt. was administrator: *Thynne v. Prothero*, 2 M. & S. 553; 2 *Ld. Raym.* 824; *Watson v. King*, 4 *Camp.* 272. But, where the cause of action arises in the time of the executor or administrator, the plea does not admit his title; so, where the plt. declares in trover upon his testator's possession, and a conversion in his own time, the plea of general issue does not admit his title as executor, but he must prove it: *Hunt v. Stevens*, 3 *Taunt.* 113. The plea can, of course, in no case admit any title but such as is stated in the declaration; and, therefore, if profert is made of letters of administration which do not establish plt.'s title to recover in the action, he will fail: 6 *Mod.* 134. Where the defendant in trespass pleads an entry to abate a nuisance, and the plt. new assigns unnecessary violence, the nuisance is admitted, and the plt. cannot go into evidence to negative it: *Pickering v. Rudd*, 1 *Stark.* 56; 4 *Camp.* 219. s. c. If the deft. in covenant for not keeping premises in repair, plead performance, "he admits, by refraining from the plea of *non est factum*, so much of the deed as is expanded on the record, but he admits no more; and, if the plt. would avail himself of another part of the deed, he must prove it in the common way:" *per Lord Ellenb. Williams v. Sills*, 2 *Camp.* 519. Where parties sever in their pleas, the pleadings of one will not affect the other party; therefore, in an action against three who sever in their pleas, an admission upon the pleadings by one of his signature, will operate against himself only, and will not exempt the plt. from proving it against the other two, if they contest it: *Gray v. Palmer*, 1 *Esp. Rep.* 135; *Bayl.* 381.

When deft. pleads in abatement or bar, he admits that the court has jurisdiction of the action; if he plead in abatement, he admits that he has no grounds for pleading any other plea in abatement precedent to it in the order of pleading; *vide ante*, 2, 5; or, if he plead in bar, he admits that he has no grounds for pleading in abatement.

As to admissions for payment of money into court, *vide post*, "*Payment of Money into Court.*"

*Admission by a Record not in the Suit in Litigation.*] An admission on a record not of the particular suit in litigation, is also an estoppel against the parties disputing it, *Com. D. Estop. A.* 1, *Co. Lit.* 352, a.; provided the parties to such record, and the parties in the particular suit in litigation, are the same or privy thereto, and the opposite party plead such admission specially as matter of estoppel, without any other plea again laying the truth of the fact admitted before a jury: *Crocker v. Fothergill*, see 2 *B. & A.* 662; *Hannaford v. Hunn*, 2 *C. & P.* 148; *Plummer v. Woodburne*, 4 *B. & C.* 625; *Bagot v. Wil-* [\*41] *liams*, 3 *B. & C.* 235; 1 *Chit. Pl.* 523; 1 *Stark. Ev.* 303. Thus, if a man acknowledges a deed to be enrolled in court, and it is enrolled of record, he cannot afterwards say it is not his deed: *Com. D. Estop. A.* 1. If a woman sue or be sued as sole, and judgment be given against her as such, though she was coverte, she cannot afterwards take advantage of it: 1 *Rol.* 869, l. 50; 1 *Salk.* 310. And a party may, in this manner, be estopped by an allegation, or by not denying a matter alleged, 1 *Rol. Ab.* 864, l. 15, *Plowd.* 48, *supra*; and see further, as to the effect of

judgments and verdicts, whether between the same or different parties, *post*, *tit. "Judgment."* Recitals in the preamble of a public act of Parliament are evidence of the facts so recited, as every subject is considered as privy to the making of them: *Rex v. Sutton*, 4 M. & S. 532.

*Admission by Record when not an Estoppel.*] An admission on a record is no estoppel or any evidence, if the record was *coram non jure*; as, a record of an action in the Marshalsea Court, where neither party was of the king's household: 1 *Rol.* 863, l. 50. Nor is an admission by record an estoppel or evidence in a court of equity, *Com. D. Estop. E.* 1; nor is it an estoppel evidence where the truth appears by the same record, *Co. Lit.* 352, b. *Hayne v. Mallby*, 3 T. R. 441: as, if a deft., sued by a wrong name, enters into a bail-bond *prout* the writ, and then puts in bail above by his right name, stating he was sued by his wrong one, he is not estopped from taking advantage of the misnomer: *Barn.* 94; *Tidd*, 688. Nor is it an estoppel or admission where the thing is consistent with the record, and merely in explanation, *Com. D. Estop. E.* 3; nor where the allegation is uncertain, and is not directly and precisely alleged, or alleged by way of argument, or inference, or recital, *ib. E.* 4; or is only a supposal, *ib. E.* 5; or is not traversable or material: *ib. E.* 6. An admission as to one of several issues does not operate as an admission to any other: *Harrington v. McMorris*, 5 Taunt. 228; 1 *Stark. Ev.* 295, ante, 40. An admission, though it has once operated as an estoppel, will not be an estoppel, if there be an estoppel against it, *Com. D. Estop. E.* 9: as, if A. claims common by grant, and, in another action against the same deft., claims it by prescription, and the deft. admits it, A., who was estopped by his former claim to allege prescription, by the admission of the deft., is afterwards at liberty to do it: 1 *Rol. Ab.* 874, l. 50; 875, l. 5. If a jury find the truth of a fact, without regard to the estoppel, the court must still give judgment against the estoppel: *Com. D. Plea. S.* 5; *Estop. E.* 10; *B. N. P.* 298. And, as to the effect of judgments with regard to the subject matter therein, see *post*, "*Judgment*," "*Verdict*."

As to the mode of proving a record, see *post*, *tit. "Record."*

*By OATH.*] Admissions made on oath by the parties afford the strongest evidence as to the facts so admitted, against the parties making them.

A man's voluntary affidavit is admissible against him, *B. N. P.* 238, *Sty.* 446; and an affidavit of one who was jointly interested with another in an action, has been held to be evidence against both: *Gil. Ev.* 56. And it has been read as an admission of a marriage, where the party making it was dead: 1 *Str.* 35. An affidavit not used as such is proof as a note or letter: *B. N. P.* 238. As to proof of affidavit, see *post*, *tit. "Affidavit."*

Answers in Chancery are evidence in trials at law against the parties that made them, *B. N. P.* 237, *Doe d. Digby v. Steel*, 3 Camp. 115; but not against other parties: *Cowp.* 591; 1 *Sal.* 286. So an answer to a bill filed against deft. by a stranger, is evidence of the naked admission

of a particular fact, though it will not be evidence of a judicial proceeding: *Grant v. Jackson*, *Peake's Rep.* 203. An answer in Chancery will be sufficiently \*proved by an examined copy: *Ewer v. Ambrose*, 4 B. & C. 25. And, as to further proof of answers and proceedings in Chancery, see *post*, tit. "Chancery."

The examination of a party, signed by him, before the commissioners of bankrupt, is evidence against him, although the questions may have been improperly put to him, with a view to the action, *Stockfleth v. De Tastet*, 4 Camp. 10; or though part only of his deposition was noted down, *Milward v. Forbes*, 4 Esp. Rep. 172; and though he might have demurred to questions, as subjecting him to penalties: *Smith v. Beadnell*, 1 Camp. 30.

The oath of a party taken before the commissioners of the income tax is evidence upon an information under the game laws, but not conclusive: 8 T. R. 120.

So the examination of a person as a witness in a court is admissible as evidence against him in an action, though he was prevented from entering into an explanation of the circumstances, under which facts may have taken place. Such testimony will, however, be open to observation: *Collet v. Ld. Keith*, 4 Esp. Rep. 212; see *Jackson v. Benson*, 1 Y. & J. 35. Evidence of this kind may be proved by a shorthand writer who has taken the examination, or by other persons present at the trial: *ib.*

Facts admitted before arbitrators are evidence against the parties; but evidence of concessions, made for the purpose of settling matters in dispute, will not be admitted: *per Ld. Ken.*, *Gregory v. Howard*, 3 Esp. Rep. 113; *Slack v. Buchanan*, *Peake's Rep.* 5. An admission made at the time of an offer to refer is admissible: 2 D. & R. 358.

An inventory exhibited by an administrator in the ecclesiastical courts is evidence of assets to the amount stated: *Hickey v. Hayter*, 1 Esp. Rep. 313.

**By SPECIALTY.—When an Admission in is an Estoppel.]** Where a party makes an admission in an instrument under his hand and seal, he is estopped, not only from disputing the deed itself, but the facts which it recites: *B. N. P.* 298; *Phi. Ev.* 83; *Com. D. Ev. B.* 5; 1 *Stark. Ev.* 302. It will, however, only operate against the parties thereto, and those who claim under them: *Mayor of Carlisle, &c. v. Blamire*, 8 East, 487; *Frogmorton v. Scott*, 2 East, 467, *post*. Thus, a party may be estopped by an indenture or deed-poll, or by an acquittance or defeasance: *Co. Lit.* 352, a. If a condition be to perform the covenants in an indenture, the party cannot say there is no such indenture: 1 *Rol.* 408, 872, l. 30. And, in all cases where the condition of a bond has a reference to any particular thing, the obligor cannot show there is no such thing: *ib.* 872, l. 50. If a condition be to pay money, for which he is bound in such a particular cognizance, he cannot say there is no such cognizance: *ib.* 872, l. 10; and see other instances, *Com. D. Estop. A.* 2. A warrant of attorney precludes a party from saying there is no debt, and estops him from pleading matter at the time of making it: *Sheldon v. Baker*, 1 T. R. 82; *Edmonson v. Parker*,



3 *B. & P.* 185. If a man execute a bond by a wrong name, *Gould v. Barnes*, 3 *Taunt.* 504, or any misdescription of himself, *Bonner v. Wilkinson*, 5 *B. & A.* 682, he should be sued by that name or description, and he cannot dispute it. The date of a lease is evidence it was executed the same day: 1 *Salk.* 76. So, where a person, who had been mortgagee of certain premises, took a conveyance of them from the assignee of the mortgager, in which they were described as unincumbered, it was held to be strongest evidence against him of the mortgage having been paid off: *Jones v. Williams*, 2 *Stark.* 52; *Baggalley v. Jones*, 1 *Camp.* 367. So the recital of a fact in the counterpart of an indenture is evidence against the party by whom it is executed: *Burleigh v. Stibbs*, 5 *T. R.* 465. So the recital of a lease, in a deed of release, is evidence that it was executed as against the releasor, and those that claim under him; but as to others, it is not, without proving there was [\*43] such a deed, \*and it is lost or destroyed: 1 *Sal.* 286; see *Burnett v. Lynch*, 5 *B. & C.* 601: and *Quære*, if such recital is, at all events, only secondary evidence: see *Peake's Ev.* 108. So a recital in an indenture of the receipt of consideration-money, and a receipt endorsed, is conclusive at law, *Rowntree v. Jacob*, 2 *Taunt.* 141; *Barker v. Dewey*, 1 *B. & C.* 704; *Lampon v. Corke*, 5 *B. & A.* 606; *Bonner v. Wilkinson*, 5 *B. & A.* 682, *Willes*, 9; and this though there be strong evidence against the receipt, *ib.* So, in an action against a master for not inserting the true consideration in an indenture of apprenticeship, the recital in that part of the indenture executed by the deft., that A. B. put himself apprentice, is evidence of that fact: *Burleigh v. Stibbs*, 5 *T. R.* 465. Where a covenant to lay out a sum in an annuity recited that the covenantor had given a bond for the payment of the money, the recital was held to be evidence of the bond: 2 *P. Wms.* 432. A grant to a corporation by a certain name is evidence against those claiming under the grantor, that the corporation was at the time known by that name: *Mayor, &c. of Carlisle v. Blamire*, 8 *East*, 493. The whole of a recital is to be taken; and, therefore, if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender: *E. of Mountague v. Ld. Preston*, 2 *Vent.* 170. In an action by executors of a lessee against the assignee of a lease, it was proved at the trial that the plt.'s testator had executed the counterpart of a lease, and that the plts. had assigned that lease to the deft., and that the latter had executed a deed, by which that lease was again assigned to a third person, and in which deed the lease which had been granted to the testator of the plts. was recited: it was held, the recital was as against deft. evidence of the original lease; and that it was not necessary to prove its execution, especially as deft. had taken a beneficial interest under it by accepting the assignment: *Burnett v. Lynch*, 5 *B. & C.* 601. A grantor is, in general, estopped by his deed to say he had no interest, 2 *T. R.* 171; but not so where the grantor is a trustee for the public; especially if, deriving his authority under a public act of Parliament, he grant that which he is not empowered to grant by the act: *ib.* If a patentee himself assign a patent, and afterwards infringe the right of the assignee, he is estopped from pleading to an action by the assignee, that the inven-

tion was not new: *Hayne v. Maltby*, 3 T. R. 439, 441. Where an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends to him, although nothing passes at that time, yet, when the inheritance descends upon him, he is estopped to say he had no interest at the time of the grant: *per* *Ld. Kenyon*, *Hayne v. Maltby*, 3 T. R. 441.

As to pleading the matter of estoppel, see *ante*, 38.

*When an Admission in Specialty is not an Estoppel.*] On the other hand, the admission is not conclusive, it should seem, if the deed be void, if the truth appear plainly from any other part of the deed, or the admission is uncertain in its nature. If the condition of a bond contain a generality to be done, the party is not estopped from showing that there was not any such thing: as, if the condition be to "carry away all the marle in such a close," he may show there was no marle there: 1 *Rol. R.* 872, l. 35, 25; *Com. D. Estop. A.* 2; 1 *Saund.* 215, n. 2. A lessee by indenture is not estopped by the description of lands in the lease, but may try the fact whether the land called L.'s meadow be meadow or not: *Str.* 610. So, if a condition be to release all his right, he may say he has not any right: 1 *Rol.* 872, l. 37. If A. demise to B. the herbage of his own land by indenture, B. is not precluded showing that A. had nothing in the land, because the lease was not of the land: *Co. Lit.* 47, b. Where A., asserting he had a right to a patent machine, covenants with B., that B. shall have the liberty of using it in a particular manner, in consideration of which \*B. covenants he will not use it in any other, in an action by A. on the covenant against B., B. is not estopped from pleading that the invention was not new, or that the patentee was not the inventor; and he may thus show that the patent was void, and consequently no consideration to him: *Hayne v. Maltby*, 3 T. R. 438. We have seen how the effect of an admission of this nature may be determined, *ante*, 43.

*By WRITINGS NOT UNDER SEAL, by VERBAL DECLARATIONS, by DEMEANOUR and CONDUCT.*] These kinds of admissions have been classed under one head, as there is so little distinction between them. The rule as to whether they are conclusive or not against the party, must be collected from the preceding observations as to the "effect of admissions in general."

*In General.*] Admissions in writing have, in general, the same effect as admissions under record, or by specialty; except, indeed, that the technical doctrine of *estoppel* applies only to the latter, 2 *Bl. Co.* 295, 1 *Saund.* 216, n. 2, *Petrie v. Hannay*, 3 T. R. 424, *Hayne v. Maltby*, *ib.* 438; and the nature of the admission is more peculiarly open for a jury. A party is precluded from disputing a record or specialty in all cases, except there be duress, fraud, or illegality in it, *Petrie v. Hannay*, 3 T. R. 418, 2 *Wils.* 344, 350; but this is by no means the case with parol or written contracts, &c. A written document has more force in evidence than if the contents of it were merely spoken. It implies premeditation, and a sort of tacit consent by the party, that that shall be

the most authentic evidence of the facts it contains. It is partly, on this account that parol evidence is inadmissible to vary what is written: *post*, "*Parol Evidence*."

Admissions by words are entitled to weight according to the circumstances under which they were spoken. They have, in general, more weight than admissions by demeanour and conduct.

Admissions by demeanour and conduct, also, may be such as to bind the parties: but admissions in loose and careless conversation, or the result of forgetfulness or inadvertence, are not entitled to any weight: *Rex v. Whitley*, 1 M. & S. 637; *Bur.* 2057; 2 Wils. 399; *post*, 46.

The admission, to render it evidence, must be freely and voluntarily made. If made in an ineffectual treaty for the compromise of an action, it will be rejected, as made by the party with a view of buying peace: *B. N. P.* 236; *Gregory v. Howard*, 3 Esp. Rep. 113. But, if the treaty has been reduced to a final agreement, signed and executed, it will be evidence, though purporting to be a compromise: 9 Price, 122, 8. An admission made conditionally, where the consideration has not been performed, is inadmissible; but an admission made on a reference which has turned out ineffectual, is admissible: *Christie v. Cowell*, Peake's Rep. 5; *Gregory v. Howard*, 3 Esp. Rep. 113. If an admission be made at the same time with an admission against it, both must be taken together, and the former has no weight: *ante*, 38; *Com. D. Estop. E.* 2, 9. The admission, to render it conclusive, must be unqualified: *Evans v. Verity*, R. & M. 239. Loose and careless admissions are entitled to little or no weight: *Rex v. Lower Whitley*, 1 M. & S. 637; *Bur.* 2057; 2 Wils. 399; *Green v. Davies*, 4 B. & C. 235; 6 D. & R. 306, s. c. An admission, uncertain in its nature, and not directly and precisely made, or made as a mere supposition, is of little or no effect: see *Com. D. Estop. E.* 4, 5, *ante*, 41. Admissions by parol against a record or specialty are not admissible. An admission involving a matter of law is insufficient: *Summerset v. Adamson*, 1 Bing. 73; *Scott v. Clare*, 3 Camp. 236. Where a party said he had taken the benefit of an insolvent act subsequent to the time when the cause of action accrued, it was held not sufficient evidence of what had been done under the insolvent act, when it could have been established by [\*45] unequivocal evidence from the rolls of the Insolvent Court: 1 Bing. 73; and see 5 B. & C. 506, where a party's misrepresentation as to the legal effect of a deed were held inadmissible.

*By Agreement.*] An admission in a contract in writing is admissible in evidence, and, in general, conclusive evidence against the party making it, 9 Price, 269. So, where the party, or his attorney, makes the admission deliberately for the purposes of the cause: *Young v. Wright*, 1 Camp. 140; 1 T. R. 710; 2 Stark. Ev. 31; 1 East, 568. An admission, signed by the obligor's attorney, acknowledging the signature of his client, and of the attesting witness, is presumptive evidence of the delivery of a deed: *Milward v. Temple*, 1 Camp. 375. But an admission of this nature, merely as to the execution of a deed set out in the pleadings, does not preclude the party from taking advantage of any

variance: *post*, "*Debt*," "*Deed*." As to proof of the attorney's signature, &c. to the admission, *post*, 54.

*By giving a Bill, &c.*] A party, on the sale of goods, &c., giving a promissory note, or entering into a bond, or other obligation, for the amount, admits thereby the contract, and the adequacy of the consideration, and will be conclusively bound, unless he prove fraud, &c. on the part of the plt.: *Solomon v. Turner*, 1 *Stark*. 51; *Knox v. Whalley*, 1 *Es*. 159; *Archer v. Bamford*, 3 *Stark*. 175; *Chit. Bills*, 72; *post*, "*Bill of Exchange*." If a person buy goods of another, who agrees to receive a certain bill in payment, the buyer's name not being on it, and that bill be afterwards dishonoured, the person who took it cannot recover the price of his goods from the buyer; for the bill is considered as a satisfaction: 15 *East*, 13; *per Bayley*. An acceptanee is *prima-facie* evidence of assets and effects in hand for the drawer: *Vere v. Lewis*, 3 *T. R.* 183; 1 *Wils*. 185; *Semb*. 1 *T. R.* 487. As to the proof of bills, *post*, "*Bills of Exchange*."

*By Receipts.*] A receipt, in general, is no more than *prima-facie* evidence of such receipt; and the facts stated in it are open to explanatory or contradictory evidence: *post*, "*Receipt*."

*By Notices, Letters, Advertisements, &c.*] The letters of a party are evidence against him, without producing the answer to them: *Ld. Barrymore v. Taylor*, 1 *Esp. Rep.* 326. However, letters and all other written instruments must be produced, or the non-production accounted for, before any evidence as to admissions of the contents of such writings, or instruments can be given: *Bloxam v. Elsie, R. & M.* 187; *post*, "*Secondary Evidence*." In an action against the endorser of a bill, proof that the deft. had written a letter stating he had received a bill corresponding with that upon which the action was brought, and that, after the issue joined, he had declared that he came to town to hasten the trial of a cause brought against him on an endorsement he had made on a bill, and that he carried the cause down by proviso, is sufficient evidence of his handwriting: *Chit. Bills*, 388; *vide infra*. A notice that a partnership is dissolved, signed by the parties for the purpose of being inserted in the Gazette, was holden to be sufficient evidence of the dissolution for all purposes against the parties signing it, although the partnership was constituted by deed, and consequently must have been dissolved by deed: *Doe d. Waithman v. Miles*, 1 *Stark*. 181; 4 *Camp*. 373, *s. c.* A notice given by an acceptor to the plt., in an action against him, to produce papers relating to a bill described in the indenture as "accepted by deft.," is *prima-facie* evidence of deft.'s acceptance: *Holt v. Squire*, 1 *Ry. & M.* 282. An auctioneer advertising property for sale, "as the property of J. S., a bankrupt," in an action against him, will be precluded from disputing the "bank- [\*46] ruptcy: *Maltby v. Christie*, 1 *Esp. Rep.* 340. Assignees of a bankrupt advertising a lease to be sold, describing themselves as owners or possessors, *prima-facie* admit their having taken to the lease: *semb. Turner v. Richardson*, 7 *East*, 340; *Page v. Godden*, 2 *Stark*. 309;

*post*, "*Bankruptcy, Actions against Assignees.*" As to the proof of letters, notices, advertisements, &c., *post*, "*Written Evidence.*"

*By Account Stated.*] We have already seen what is evidence to support an account stated: *ante*, 31, 2. An account stated is not, in general, conclusive evidence against the party admitting the balance to be against him: 1 *T. R.* 42.; *ante*, 32. He would be allowed to show a gross error or mistake in the account, or any fraud or misrepresentation by the other party, if he could adduce clear evidence to that effect. But where an account is settled, and the party gives a bill for the amount, but which bill is not paid, he cannot, as we have just seen, on an action brought, impeach the charges in the first account which has been settled: 1 *Esp. Rep.* 159; *ante*, 45. And, where parties having cross demands settle and balance their accounts, though part of the plt.'s demand could not have been recovered in an action, the settlement of the accounts will bind the defendant, so that he cannot set up that defence to an action for the balance: 6 *Esp. Rep.* 24; 12 *Mo.* 517; *Ch. C.* 199.

Accounting with the other party in a particular character, admits that character: 10 *East*, 104; *post*, 49. Stating an account will, in general, amount to an admission of the title of the party to receive the money: as where the deft. agreed verbally with plt. to take a house and purchase the fixtures at a valuation, and an inventory of the fixtures and furniture was accordingly made, described generally as "an inventory of the fixtures," &c. with the gross amount placed at the foot thereof, it was held, that the deft., having taken possession of the furniture and fixtures, and paid part of the amount of the valuation, was liable on an account stated for the remainder, and could not object to the plt.'s defective title to the house: *Salmon v. Watson*, 4 *Moore*, 73.

*By Demeanour and Conduct.*] Admissions arising from demeanour and conduct are conclusive evidence against the party, where he has derived a benefit therefrom or prejudiced another. As, where a bankrupt had petitioned for his discharge under 49 *G. 3*, c. 121, s. 14, it was held that he could not, in an action against his assignees, dispute the validity of the commission, "for, having availed himself of the commission for one purpose, he could not afterwards be allowed to assert to the same judges before whom he took the benefit of it, that it was invalid:" *Watson v. Wace*, 5 *B. & C.* 153-5. So, where the bankrupt had gone to various persons to solicit them to vote in the choice of assignees under his commission, *Like v. Howe*, 6 *Esp. Rep.* 20, or where he had taken a part in the sale of his own effects under the commission, *Clarke v. Clarke & ors. ib.* 61, it was held he could not afterwards dispute the validity of the commission. But a bankrupt's merely presenting a petition to enlarge the time of his surrender, in which he stated he had been duly declared a bankrupt, does not so preclude him: *Mercer v. Wise*, 3 *Esp. Rep.* 216. A bankrupt will be restrained in equity, by injunction, from proceeding at law after having repeatedly questioned the commission, or after acquiescence and delay: *Arch. B. L.* 278; *Ex parte Cutlen*, 1 *G. & J.* 317. If a patentee assign his patent, and afterwards infringe the right of the assignee, he is estopped from pleading,

to an action by the assignee, that the invention was not new: *Hayne v. Maltby*, 3 T. R. 439, 441. In actions of use and occupation, when the tenant has occupied by plt.'s permission, he cannot dispute his title, *Pea. Ev.* 244, *Doe d. Nepean v. Budden*, 5 B. & A. 626; but he may show he was compelled to "pay the rent to another party: [\*47] *Taylor v. Zamira*, 2 Marsh. 230, *post*, "*Landlord and Tenant*." So, a landlord, by allowing a tenant to expend money in improvements, admits a consent to alterations: *Doe d. Sheppard v. Allen*, 3 Taunt. 78. If a wife brings dower and recovers, she is estopped afterwards from claiming land settled upon her for her jointure; and this, though she entered clandestinely into the land settled for her jointure before the writ of dower brought: 1 Rol. 862, l. 20, 25; 4 Co. 5; *Com. D. Estoppel*, A. 3. So, a man may be estopped by acceptance of rent, *Co. Lit.* 352, a.; or by entry or livery, &c.: *ib.* By offering money to bribe a voter, a person admits that the party solicited his vote: 3 Bur. 1590. A man who cohabits with a woman, and treats her as his wife, thereby admits her to be such: *Watson v. Threlkeld*, 2 Esp. Rep. 637; *Robinson v. Nahon*, 1 Camp. 245; *Munro v. De Chemant*, 4 *ib.* 215. So, a defendant is estopped, by the recognisance of bail entered into for him by the name by which he is sued, from pleading a misnomer, although he is no party to the recognisance, for, by these acts, he takes a benefit, and is conclusively bound by them: 2 N. R. 453. So, a party, admitting or representing his name to be *Thomas*, cannot afterwards say it is *William*; *Price v. Harwood*, 3 Camp. 108; *Bass v. Clive*, 4 M. & S. 13; *ante*, "*Misnomer*," 10.

*By Acquiescence and Silence of a Party.*] Where the existence of a debt, or of a particular right, has been asserted in the presence of a party, and he has not contradicted it, such acquiescence and silence will amount, *prima-facie*, to an admission of the debt or right. So an acquiescence and endurance, when acts are done by another which, if wrongfully done, are encroachments, and call for resistance and opposition, are evidence as a tacit admission that such acts could not be legally resisted: *Jarrett v. Leonard*, 2 M. & S. 265; *Morris v. Burdett*, 1 Camp. 218; *Steel v. Prickett*, 2 Stark. 471; 2 Stark. Ev. 37. Where a notice to quit is served personally on a tenant, and he makes no objection to the time specified in the notice, it is *prima-facie* evidence of the correctness of such notice, if the party reads or understands the tenor of it at the time of the service: *Doe d. Baker v. Wornbwell*, 2 Camp. 559; *Doe d. Clarges v. Forster*, 13 East, 405; *Doe d. Leicester v. Biggs*, 2 Taunt. 109. If the occupier of a house submits to a distress for rent, described in the notice of distress to be due from him as tenant of the distrainer, it is an admission of the tenancy: *Panton v. Jones*, 3 Camp. 372; 1 H. B. 311. If a party, holding goods as a lien, claim them on another ground when they are demanded, and do not make mention of the lien, he is precluded afterwards setting it up: *Boardman v. Sill*, 1 Camp. 410, n.; *Martini v. Coles*, 1 M. & S. 147; *post*, "*Lien*." A person, by allowing his name to appear as a partner, is precluded in general, from showing he is not: 7 Price, 193; 2 Chit. R. 120; *post*, "*Lien*."

A deft. who has never applied for a title, is not allowed to set up the want

of it against the plt., who has obtained one after the commencement of an action for not completing the purchase: *Thompson v. Miles*, 1 *Esp. Rep.* 184.

The omission of a debt by an insolvent in his schedule, is evidence against him, although it does not estop him from suing, *Hart v. Newman*, 3 *Camp.* 13; and, if he does not include the whole amount of a debt in his schedule, he may be sued for the amount not inserted: *Taylor v. Buchanan*, 4 *B. & C.* 419.

The not having an attorney's bill taxed, is an admission that the charges therein are reasonable: *Peake's Ev.* 262, 264; *Anderson v. May*, 2 *B. & P.* 237; 1 *Doug.* 198; *Lee v. Jones*, 2 *Camp.* 496.

In a late important case on this subject, where the paymaster of a military corps, had given credit in amount to an officer in that [\*48] corps, from the 1st *January*, 1817, to the 6th *November* 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th *August*, 1806, to an officer of his situation, and a statement of that account was delivered to the officer in 1821: in *December*, 1816, the paymasters were informed, by the Board of Ordinance, that the increased pay granted by the order of 1806, would not be allowed to persons in the situation of the officer in question: the paymasters did not communicate this information to the officer until 1821; and, subsequently to that time, they continued to receive his pay: it was held, in an action brought by his personal representatives to recover such pay, it was not competent to the paymaster to retain any such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider as his own for so long a period of time: *Skyring v. Greenwood*, 4 *B. & C.* 281; *Shaw & ors. v. Picton*, *ib.* 715; and *vide E. I. Company v. Tritton*, 3 *B. & C.* 280; *Hume v. Bolland*, 1 *R. & M.* 371; *E. I. Company v. Prince*, *ib.* 407; *Show v. Dartnall*, 6 *B. & C.* 56.

Parol admissions may be given as to the contents of letters and other writings, but their non-production must be accounted for: *Bloxam v. Elsie*, *R. & B.* 187. And, though an admission have reference to an account signed, it cannot be given in evidence; but a verbal admission by the deft., of his having had certain articles and sums of money exceeding 40s., which are inserted in a book signed by him, may be referred to by witness to refresh his memory as to deft.'s admissions. As, where the plt. entered an account in writing of goods and cash furnished to the deft. from time to time, each page of which was authenticated by the deft.'s acknowledgement, *in writing*, of the receipt of the contents, it was held that, although such an acknowledgement in writing could not be given in evidence *per se*, in respect of the sums exceeding 40s. in each page, for want of receipt stamps, yet that plt. might prove that, upon calling over each article to deft. he *verbally* admitted that he had received the same: *Jacob v. Lindsay*, 1 *East*, 460.

*Admissions of Debts.*] A debt may frequently be admitted by the acts of a party, so as to render no further proof of it necessary: see instances, *ante*, 39, *to supra*. Where deft. said that he could not pay a debt for which he had been arrested, but would give a bill for it, such admis-

sion will entitle plt. to a verdict for £10, as the deft. could not have been arrested for a less sum: *Brathwaite v. Churchill*, 2 C. & P. 341; *Fletcher v. Froggatt*, Chit. B., 230; 2 C. & P. 569, s. c. And, where deft. admitted that he owed a debt, and that he would pay it, on such an admission, the plt. on proving the amount due, will have a verdict with nominal damages: *Dixon v. Deveridge*, 2 C. & P. 109; *sed vide* 4 Moore, 542. A qualified acknowledgment of a sum due to plt., who does not prove any consideration on which the deft. became indebted to him, will not entitle him to recover upon an account stated: *Evans v. Verity*, R. & M. 239. And see further as to evidence of an account stated, *ante*, 22, 31. Where the plt., in assumpsit, gave in evidence an admission of the deft. that he owed £147 on a bill of exchange which had been returned dishonoured, it was held that such acknowledgment was admissible, though no notice to produce the bill had been given: *Fryer v. Brown*, R. & M. C. 145. See "*Statute of Limitations*."

*Admissions of Liability.*] A liability may also be so admitted by a party as to render no further proof of it necessary. Thus an acknowledgment by a deft., that his trade is a nuisance, is admissible, though not conclusive against him: *Rex v. Neville*, Pea. Rep. 91. In an action for criminal conversation, an admission by the deft., that he had committed adultery with the wife of the plt., is not sufficient without proof of a marriage, in \*fact; unless, indeed, the deft. had [\*49] seriously and solemnly recognised that he knew the woman was plt.'s wife: *Bur.* 2057, 2 Wils. 399.

*Admissions of a particular Character.*] Persons, by acting in a particular character, in general admit that character. Thus, peace-officers, justices, &c., admit themselves liable in those characters, and proof of their so acting is sufficient evidence, without regular proof of their appointment: *Berryman v. Wise*, 4 T. R. 366.

Where a clergyman is sued for non-residence, his acts as parson, and receipt of the emoluments of the church, admit the character in which he is sued: 1 N. R. 210; *Bevan v. Williams*, 3 T. R. 635, n. And, in an action of slander of an attorney, words spoken by the deft. concerning him in that character, are evidence of his being an attorney, without further proof: *Berryman v. Wise*, 4 T. R. 366; *Pearce v. Whale*, 5 B. & C. 39. So, in the case of a physician, 1 N. R. 196; 8 T. R. 303, 5, n.; and see *Yrisarri v. Clement*, 3 Bing. 432. And, where deft. has treated with the plt. in the capacity in which he sues, it is an admission of his character: as, proof that deft. accounted with plt. as farmer of the post-horse duties, is evidence of plt.'s appointment as such: *Radford v. McIntosh*, 3 T. R. 632. And proof that deft. has paid tithes to the plt., is evidence of his title to receive them: 3 T. R. 635, 4 T. R. 367. So, having paid tolls to a party, is evidence of his character of collector: *Peacock v. Harris*, 10 East, 104; *ante*, 467. *Lister v. Priestley*, Wightw. 67. And, where a party describes himself as holding a certain situation, no farther proof is necessary; as, where an officer signed false returns, the proof of his having signed them was evidence of his appointment: *Rex v. Gardner*, 2 Camp. 513,



*supra*. And, where a person styled himself an "M. D." he could not recover the amount of his fees: *Lipscombe v. Holmes*, 2 *Camp*. 441; *Chorley v. Bolcot*, 4 *T. R.* 317. So, in an action brought against deft. as publisher of a newspaper, proof that he had given a bond to the Stamp Office, and from time to time attended at the Stamp Office respecting certain duties, was held evidence of his being publisher: *R. v. Topham*, 4 *T. R.* 126.

*Admissions of Handwriting.*] The handwriting of a party may be proved as against him by his admission; and, if such admission was made so as to obtain a benefit to the party making it, he will be conclusively precluded afterwards from disputing the fact, or showing the handwriting was a forgery; *Leach v. Buchanan*, 4 *Esp. Rep.* 226, 2 *Str.* 1051, 12 *Mod.* 809, *Chit. Bills*, 185. Evidence of such admission may be collected from a notice or letter impliedly admitting it; *ante*, 45. Promise to pay the amount of a bill, &c., or a part payment after it is due, admits the handwriting to such bill, &c.: *Helmsley v. Loader*, 2 *Campb.* 450; *Jones v. Morgan*, *ib.* 474; *Bosanquet v. Anderson*; 6 *Esp. Rep.* 43. Proof of a party's paying several other bills of the same character as the one in litigation will be sufficient evidence of such party's signature and liability: *Barber v. Gingell*, 3 *Esp. Rep.* 60. An admission of a handwriting made by the party pending a treaty for compromising a suit is evidence against him, *Waldridge v. Kennison*, 1 *Esp. Rep.* 143. And see further, as to handwriting, *post*, "Handwriting."

*Admission, of no Interest in Suit.*] If a plt. admit he has no interest in the action, he will be nonsuited: *Bauerman v. Radenius*, 7 *T. R.* 664. And, in an action on a bill of exchange, evidence of an admission by the plt. that he has no interest in the bill, will be ground of nonsuit. *ib.* An admission by the lessor of the plt. in ejectment, that he had assigned his interest in the premises, is evidence against him: *Doe v. Watson*, 2 *Stark.* 230.

[\*50] \*III. *Effect of with Reference to, by whom made.*

*Who bound by.*] It is a general rule, that the estoppel and admission of a party bind all parties and privies to it; whether in blood, as the heir, *Co. Lit.* 352, a., *Com. D. Estop. B.*; *Pol.* 61, 66; *Jones*, 460; in estate, as the vendee, 1 *Salk.* 276; in law, as the lord by escheat, *Co. Lit.* 352, a.; or claiming under the same judgment, 1 *Salk.* 276; or by act of law, or in the post, *Co. Lit.* 352, a.; tenant in dower, or by the courtesy, *ib.*, *Pollex.* 61. One who claims under a bond or deed-poll is as much estopped as the obligee: 2 *Rep.* 4. Matter of estoppel, strictly so called, is reciprocal, and binds both parties to it: *Co. Lit.* 352, a.; *Cr. E.* 700; *Gould v. Barnes*, 3 *Taunt.* 504; *Lutw.* 894; *Dy.* 279, b. Courts and juries are not bound by estoppel: *ante*, 38.

*Who may take advantage of.*] Every one who claims under, or is affected by, an estoppel or admission, may take advantage of it: but a mere stranger cannot: 1 *Rql.* 868, l. 47; *Co. Lit.* 352, a. Thus, the

purchaser of a reversion of lands demised may take advantage of matter of estoppel, for the estoppel runs with the land: *Str.* 817; 2 *Ld. Raym.* 1550. A woman who claims dower may take advantage of an estoppel, by deed between her husband and his tenant: 1 *Rol.* 868, *l.* 47. If A. demises by indenture to B. for life, and afterwards by fine grants the reversion, the conusee shall estop B. in a *quia juris clamat*, to say that A. had nothing: *ib.*, *l.* 10. An officer, in the execution of process, may take advantage of an estoppel upon record in the same action, as if a *feme covert* be sued as a *feme sole*, or there be a misnomer, &c.: 1 *Rol.* 869, *l.* 50, 45; 1 *Salk.* 310. The king shall take advantage of an estoppel, though he be not, in fact, a party to the record; for he is always present in court: 2 *Inst.* 39. So every person may take advantage of a disability which appears by record, as outlawry, attainder, &c., though he be a stranger to the record, *Co. Lit.* 352, *b.*, 128, *b.*; so of bastaady, &c., *ib.* But a stranger cannot take advantage of the *misnomer* of any one upon record; for he is not bound by it: *ib.* What a man writes or says for himself cannot be evidence for himself or his representative: 2 *Ves.* 43; *Rex v. Debenham*, 2 *B. & A.* 187. A survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner, 1 *Str.* 95; when otherwise, 1 *Ld. Raym.* 734, *post*, 58. Admissions made by a deceased person, under whom deft. claims, acknowledging the receipt of rent for the premises in question, are not admissible in evidence for the deft.: *Outram v. Morewood*, 5 *T. R.* 123. And see further, as to the effect of admissions, &c., made by third persons, entries by deceased servants, &c., *post*, 57.

*By PARTY to the SUIT, though NOT BENEFICIALLY INTERESTED.]* The admissions made by the parties to the suit, as to facts within their knowledge and against themselves, are generally evidence, though he be not the party beneficially interested, and are always so if he be interested: as, where a party sues as a trustee, &c., for the benefit of another: *Bauerman v. Radenius*, 7 *T. R.* 663; *ib.*, 670, *n.*; *Rex v. Hardwicke*, 11 *East*, 578. So, where plt.'s admission of their having no interest in the suit, was given in evidence by deft. to defeat the action, *Lawrence, J.*, said, "I have looked into the books to see if I could find any case, in which it has been held that the admission of a plt. on the record is not evidence, but have found none." 7 *T. R.* 669. Where an obligee, who has assigned a bond, sues on it, his admissions are evidence: 7 *T. R.* 670, *n.*, 668. But the admissions by a guardian, although the plt. on record, are not evidence against the infant, 3 *Mod.* 258, *Cowling v. Ely*, 2 *Stark.* 366; nor can the answer of a guardian in Chancery be read against the infant: *ib.* And the declarations of \*a *prochein amy*, made before action brought, are not admissible [\*51] for the deft.: *Webb v. Smith*, *R. & M.* 106.

*By PARTIES really INTERESTED, though not Party to the Suit.]* The admissions of a party really interested in the cause of action, though he be no party to the suit, are always evidence; for the parties interested are, in this respect, looked upon as parties to the suit; and what will be a defence against them would, in many instances, be a defence against the plt.

*By third Party.]* In an action upon a bond, conditioned for the payment of money to a third person, an admission of such third person, that the deft. owed nothing, is conclusive evidence for the deft.: *Hanson v. Parker*, 1 *Wils.* 257. So, in actions by the sheriff, when indemnified by the party really interested, the admissions of such party will be evidence to defeat the action: *Dowden v. Fowle*, 4 *Camp.* 38; *Young and another v. Smith and another*, 6 *Esp. Rep.* 121; *Duke v. Aldridge*, cited 7 *T. R.* 666. But a declaration by the party, under whom a deft. in replevin makes cognizance, is not evidence for plt.: *Hart v. Horn*, 2 *Camp.* 92. In actions on policies, the admissions of the parties really interested are evidence: *Bell v. Ansley*, 16 *East*, 143. So, in an action by a master of a ship for freight, the admissions of the owner, for whose benefit the action is brought, are evidence for the deft.: *Smith v. Lyon*, 3 *Camp.* 465; *Hart v. Horn*, 2 *Camp.* 92: 1 *Wils.* 257. In trover for a deed, the declaration of the party at whose request the deft. admitted he detained the deed, was held evidence for the plt.: *Harrison v. Vallance*, 1 *Bing.* 45. And, where A. deposited with B. a sum of money, to distribute among A.'s creditors, in an action by C. (a creditor) against B. for the amount of his portion, the admission of A. was received as evidence that C. was a creditor to a certain amount: *Robson v. Andrade*, 1 *Stark.* 372. In trover for a deed which the deft. had, by letter, admitted he detained at the request of W. R., and in the detainer of which W. R. was substantially interested, it was held that declarations of W. R., in favour of the plt.'s claim, were properly received in evidence: *Harrison v. Vallance*, 1 *Bing.* 45. In settlement cases, all declarations by rated parishioners are evidence against the parish; for they are parties to the cause: *Rex v. Whitley*, 1 *M. & S.* 636; *Rex v. Hardwicke*, 11 *East*, 578.

*By Partners.]* The admission of one partner, after proof of the partnership (*post*, "*Partners*"), is evidence against another, in all cases of their joint contracts, as their interest is joint: *Nicholls v. Dowding and others*, 1 *Stark.* 81; *ib.* 161; 1 *Taunt.* 104; *Pea.* 203. Where several partners sued for breach of contract, a declaration by one, that the subject matter of the contract was his property alone, was admitted against all the partners, to defeat the action: *Lucas v. De la Cour*, 1 *M. & S.* 249; 1 *Holt*, 141. But an admission by a partner as to a subject not of copartnership, but of conjoint ownership in a vessel, is not binding on his copartners: *Jaggers v. Bennings*, 1 *Stark.* 64; *Hooper v. Lusby*, 4 *Camp.* 66. In covenant against two, the voluntary affidavit of one, upon a subject in which they are jointly interested, will be evidence against the other: *Gilb. Ev.* 56; *Peake*, 269. An admission of one partner in an answer to a bill in equity is not admissible in evidence against the rest: *Rooth v. Quin*, 7 *Price*, 198. An admission by one of several joint contractors must be clear and explicit to bind or affect the others; and it has, therefore, been held, that, in order to take a case out of the Statute of Limitations, in an action on a promissory note, it is not sufficient to show a general payment by a joint maker of the note to the payee within six years, so as to throw it upon the deft., to show that the payment was not made on account of the note: *Holme*

v. *Green*, 1 *Stark*. 488. A payment within six years of a dividend on a joint and several note, under a commission against one of \*the makers, has been held to preclude the other from availing [\*52] himself of the statute: 2 *H. B.* 340. But this was doubted in *Brandram v. Wharton*, 1 *B. & A.* 468, &c., on the ground that the acknowledgment, besides being a constructive one, was made by parties (the assignees), who could not be called upon for contribution: and where one of the two joint drawers of a bill of exchange became a bankrupt, and, under his commission, the endorsee proved a debt (beyond the amount of the bill) *for goods sold, &c.*, and exhibited the bill incidentally (as a security he then held for his debt), and afterwards received a dividend, it was held, in an action by the endorsee against the insolvent drawer, that the payment of the dividend within six years did not revive the demand against him: *ib.* Admissions by partners as to any transactions which occurred during its continuance, will be evidence, though made after the dissolution of the partnership, *Wood v. Braddick*, 1 *Taunt.* 104; but admissions as to facts which occurred after its dissolution, *ib.*, or previous to the partnership, unless a joint responsibility be proved as a foundation for the evidence, are not evidence: *Catt v. Howard*, 3 *Stark.* 3. It is immaterial whether the partner be a party to the suit: 1 *Taunt.* 104.

*Admissions by Trustees, Assignees, Executors, &c.*] The admission by a trustee does not bind his co-trustee, when they are not personally liable, *Davies v. Ridge*, 3 *Esp. Rep.* 101; and it should seem, the same rule will apply to assignees of a bankrupt, insolvent, &c.: *sed quære*, *Eden*, 202.

*Admissions by a Party jointly and severally interested.*] Where there is a joint interest in several, the admission of one will be received against the others. Thus, the admission of one of several makers of a joint and several promissory note, that it has not been paid, is evidence against all, *Whitcomb v. Whiting*, *Doug.* 652; and this though one of them was a mere surety, and a separate action brought: *Perham v. Raynal*, 2 *Bing.* 306; *Pittam v. Foster*, 1 *B. & C.* 249. But, after the death of one of several joint, or joint and several contractors, his executors cannot be prejudiced, or rendered liable, after the lapse of six years, by an admission or part payment of the demand by the surviving debtors: *Atkins v. Tredgold*, 2 *B. & C.* 23; 3 *D. & R.* 200, *s. c. supra*, 51, 2.

*Admissions by Cotrespassers.*] Where parties are established to be cotrespassers or wrong doers, or to have entered into the same criminal design, with a view to its accomplishment, the admissions of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object, *p. L. Ellenb. Rex v. Inhabitants of Hardwicke*, 11 *East*, 585, and this, though such admissions be made by one in the absence of the others. Thus, if three debts have jointly imprisoned the plt., the declarations of one of the debts, made some weeks after, in the absence of the

others, tending to show that the imprisonment arose from malice, are admissible evidence in an action for false imprisonment brought against all three: *Wright v. Court*, 2 C. & P. 233. A co-defendant, against whom the plt. has given *no evidence*, may be called as a witness, but he has no right to an acquittal to be made a witness, until the other evidence for the defts. is finished: *Wright v. Paulin*, R. & M. 128.

*Admissions by Party represented, as Bankrupts, &c.]* An admission by the party represented is usually admissible in evidence against his representative: *Bateman v. Bailey*, 5 T. R. 513; *Smith v. Simmes*, 1 Esp. Rep. 330, 389. An admission made by a bankrupt before the act of bankruptcy is evidence to charge his estate with a debt, 5 T. R. 513; but an admission made afterwards is inadmissible for that [\*53] purpose. That "admissions made by an insolvent subsequent to his insolvency are not admissible against the trustees of his estate: 1 Esp. Rep. 330. As to the admissions of bankrupts to prove petitioning creditor's debt, *post*, "*Bankrupt*."

*Admissions by Agents.]* The admission of an agent as to acts within the scope of his authority, and when so acting, are as conclusive evidence against the principal, as if he had himself made the admission: 4 Taunt. 519; *Belham v. Benson*, Gow, 45; *Fairlie v. Hastings*, 10 Ves. 127. Therefore, the admission of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but, if made at another time, the servant must be called as a witness: *Alexander v. Gibson*, 2 Camp. 555; *Helyear v. Hawke*, 5 Esp. Rep. 72. So, the admission of an under-sheriff, or of a sheriff's officer, with reference to any part of their conduct for which the sheriff is answerable, is evidence against him: *Yabsley v. Doble*, 1 Ld. Raym. 190; *North v. Miles*, 1 Camp. 389 & n., "If a man refer another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself," *p. L. Ellenb.*, *Williams v. Innes*, 4 Camp. 365; as he thereby constitutes him his agent for the purpose of admission. Where the purchaser of goods denied the delivery, but says, "if the carrier's servant says he delivered the goods, I will pay," the answer of the servant is evidence after his death: *Daniel v. Pitt*, 1 Camp. 366, n. And, where deft. agrees to admit a claim if J. S. will make an affidavit of it, the affidavit will be conclusive: *Lloyd v. Willan*, 1 Esp. Rep. 178. And, where deft., being applied to for payment, says, "A. will pay you," A.'s admission is evidence of the debt: *Burt v. Palmer*, 5 Esp. Rep. 145; 1 Camp. 364. "The declaration of an agent can only be evidence against the principal, where it accompanies the transaction, (and forms part of the contract entered into by him) about which he is employed; and, if made at another time, it is not admissible:" *per Sir W. Grant*, *Fairlie v. Hastings*, 10 Ves. 123. And the general rule as to the statement of the agent is, "where it is proved that A. is agent of B., whatever A. does, or says, or writes, in the making of a contract, as agent of B., is admissible in evidence; because it is a part of the contract which he makes for B., and therefore binds B.; but it is not admissi-

ble as his account of what passes :” *per Gibbs, J., Langhorn v. Allnut*, 4 *Taunt.* 519. Therefore, it is decided that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he was employed, were not admissible in evidence against the principal, being merely the representation of the agent: *ib.* And where B., through the medium of his agent, chartered a ship to A., and engaged by the charter-party that she was sea-worthy, a letter written by that agent to a third person previously to the charter-party being effected, tendering the ship for hire, is not admissible in evidence, since it did not form a part of the contract on which the action was founded; but the agent himself must be called: *Betham v. Benson, Gow*, 48. It is said to have been ruled at *N. P.*, that, where A. had ordered goods of B., to be delivered to C., an acknowledgment of the receipt by C. was evidence against A., *Biggs v. Lawrence*, 3 *T. R.* 454; but *Ld. Kenyon* frequently ruled the contrary: see *Bauerman v. Radenius*, 7 *T. R.* 665; *Goss v. Wallington*, 3 *B. & B.* 138; 1 *Phil. Ev.* 93. However, in all cases “where any fact material to the interest of either party rests in the knowledge of an agent, the general rule is, that it ought to be proved by his testimony, and not by his mere assertion,” 10 *Ves.* 128; and the declarations of the agent are admitted in evidence (on the principles alluded to), not for the purpose of establishing the truth of the fact stated, but as representations, by which the principal is as much bound as if he had made them himself: 1 *Phil. Ev.* 94. As to admissions and entries made by deceased stewards, bailiffs, agents, &c., *post*, 57. The agency must, in all cases, \*be first established before the admis- [\*54] sions are evidence. As to the manner of proving the agency, *post*, “*Principal and Agent.*”

*Admissions by Counsel.*] A statement made by a counsel upon his address to the jury, in the hearing of his client, is binding on the client if he makes no objection: *per Burrough, J.*, 3 *Bing.* 119.

*Admissions by Attorneys.*] “If a fact is admitted by the attorney on the record, with the intent to obviate the necessity of proving it, his client will be bound by the admission, as he must be supposed to have authority for that purpose:” *p. L. Ellenb., Young v. Wright*, 1 *Camp.* 141; *ante*, 45. And propositions made by an attorney, on the part of his client, respecting a demand which another person had against him, is good evidence against his client: *Gainsford v. Grammar*, 2 *Camp.* 9. So, the admission of an attorney as to the execution of a deed, or the dishonour of a bill, is conclusive evidence of those facts, *ib.*; so his making an offer on the part of his client to pay a certain composition, is sufficient evidence to take a case out of the Statute of Limitations: 2 *Camp.* 11. And a letter written by an attorney to his client, and produced with his client’s signature endorsed upon it, has been admitted as evidence against the client, *Ass. of Meyer v. Sefton*, 2 *Stark.* 274. But the admissions of an attorney merely in conversation are not evidence: *Young v. Wright*, 1 *Camp.* 141; *Meyer v. Sefton*, 2 *Stark.* 275. Therefore, offers made by plt.’s attorney, in the hearing of a third person, to do an act relative to the deft., are not admissible evidence to

affect the plt. with such offers, even though they were within the scope of the attorney's authority; but, had they been made to the deft. himself, they would have been admissible: *Wilson v. Turner*, 1 Taunt. 398. It is in all cases sufficient to prove that propositions were made by the attorney on the record, without further proof of authority; "as the law will infer that he had authority for what he said or did upon the occasion," per *Ld. Ellenb., Gainsford v. Grammar*, 2 Camp. 11; and it is immaterial whether they were made before or after the commencement of the suit, if the relation of client and attorney subsist: *ib.*, *Marshall v. Cliff*, 4 Camp. 133. Admissions by an attorney are as those of an accredited agent, and cannot be proved by him from a regard to the privilege of his client, but must be substantiated by other testimony: *ib.*; *post*, "Witness."

*Admissions by Wife.*] The admissions of a wife, in cases where she can be considered the agent of her husband, are evidence against him: *Emerson v. Blonden*, 1 Esp. Rep. 142. Therefore, where the wife has acted for the husband, and with his consent, in the transaction of his affairs, he will be bound by admissions made by her respecting those affairs. Thus, where she has been suffered to transact the business at home, and purchase the articles used in the business, her admission as to the state of the accounts between her husband and the plt. who supplied her with the goods, are evidence against the husband: *Anderson v. Sanderson*, 2 Stark. 204, 1 Holt, 591, s. c. And, where the wife has been accustomed to serve in the shop, and to transact the business in her husband's absence, an offer made by her to settle the demand is admissible in evidence in actions for goods sold against the husband: *Clifford v. Burton*, 1 Bing. 199. And where the wife pays for goods, and manages the business generally, her admission will take a case out of the Statute of Limitations, *Palethorp v. Furnish*, 2 Esp. Rep. 511, n.; and the wife, where the husband occasionally visited her, will be deemed his agent, with reference to admissions by her for goods (necessaries) furnished her: 1 Camp. 394. But the general rule is, that a wife's admissions will not bind the husband, "as breaking in upon the confidence subsisting between man and wife:" *Aveson v. Ld.* [\*55] *Kinnaird*, 6 East, 196. Therefore, in an action by the husband for wages due to the wife, her admission of the receipt of the money is no evidence against him: 2 Str. 1094; *Carey v. Adkins*, 4 Camp. 92. Even in an action by the husband and wife, in right of the wife as executrix, her declarations will not be evidence: *Alban & ux. v. Pritchett*, 6 T. R. 680. An admission by the wife of a trespass cannot bind the husband, *Den v. White*, 7 T. R. 112; nor can the answer of the wife in equity be read against the husband: 3 P. Ws. 238. As to the admission of wife's declarations when made as *res gesta*, and as part of the transaction itself, *post*, 56. When husband and wife are incompetent witnesses for or against each other, *post*, "Witness."

*Admissions by STRANGERS in general.*] On the other hand, admissions made by third persons are not, in general, evidence against the party, as they usually fall within the description of *res inter alios acta*.

are too vague in themselves to afford any fair and reasonable presumption as to the truth of the fact to which they relate, and are not adequate means of communicating the fact, since the two great truths are wanting: *Co. Lit.* 352, *a.*; see 1 *Stark.* 316. Thus, an admission by a tenant cannot bind his landlord or the inheritance. Therefore, the laches or acquiescence of a tenant cannot prejudice his landlord, or the reversioner; as, if he suffer encroaching lights to be put up, or dedicate a way to the public, without the knowledge or consent of his landlord and reversioner: *Daniel v. North*, 11 *East*, 372; 2 *Saund.* 175, *d. e.*; *Wood v. Veal*, 5 *B. & A.* 454; 4 *B. & C.* 574. The admissions of a principal are not evidence against his surety, *Harper v. Charlesworth*, 4 *B. & C.* 574; when otherwise, *Goss v. Watlington*, 3 *B. & B.* 132, *post*, "*Guarantee*." The declaration of a party under whom *deft.* makes cognizance, is no evidence for the *plt.*: *Hart v. Horn*, 2 *Camp.* 92. Admissions by other parties to a bill of exchange or note are not, in general, evidence against the rest: *Barnes*, 436; *Chit. B.* 381, 388; and *post*, "*Bills of Exchange*." The declaration of an individual corporator is not evidence against the corporation who defend: *Mayor of London v. Long*, 1 *Camp.* 22; 2 *Keb.* 295; 2 *Lev.* 231; *Rex v. Hardwick*, 11 *East*, 584; 7 *T. R.* 365. If a son be estopped by his pleading upon record, and dies, his uncle and heir are bound; but, if he dies, and the land descends to the father, he is not bound by the estoppel of his son, for he cannot be heir to him: *Co. Lit.* 12, *a.* If the heir apparent to a copyholder in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee: 3 *T. R.* 365. If the heir does not claim the land from him who made the estoppel, but by his own purchase, or by another ancestor, he is not bound by the estoppel, *Jon.* 460; and this though he derives his blood from the party to the estoppel, *ib.* A woman is not estopped after coverture, by an admission upon record by her husband and her during coverture, *Com. D. Estoppel, C.* A *deft.* in trespass for mesne profits is not estopped by a judgment in ejectment against the casual ejector, on which no writ of possession was issued, if he was not a *deft.* in the ejectment: *Str.* 960. A deed-poll does not estop a lessee or grantee, for it is the deed of the lessor or grantor only, *Co. Lit.* 373, *b.*; and, therefore, if a disseissee take under a deed-poll from the disseisor, he is not estopped from denying the title of the disseisor, and claiming the estate; but one claiming under a bond, or deed-poll, is as much estopped as the obligee: 2 *Co. Rep.* 4. In some cases, indeed, the admissions of third persons are evidence: thus, reputation and traditionary declarations by third persons, are evidence in support of character, custom, prescription, boundary, and pedigree. (See these titles.) So are entries and declarations accompanying acts; entries made by third persons, agents of the parties; and perhaps generally all such entries as have been made by persons who possessed peculiar means of knowledge, and who [\*56] are under no temptation to make a false entry, as entries by deceased rectors and tenants, and title deeds: 1 *Stark. Ev.* 306-7, *infra*.



*Admissions by third Persons peculiarly connected with Act itself.]*

In general, the entries and declarations of third persons are evidence, when they are so connected with the acts or conduct of others, as to afford presumptions, independently of any credit attached to them as mere recitals or statements of some other fact. Such a declaration is evidence, to show with what intention an act is done; for, unless there be some reason to suppose the contrary, a presumption arises, that a cotemporary declaration indicates the real nature of the act: 1 *Stark. Ev.* 307. To exclude evidence of this nature, might be to exclude the only evidence of which the nature of the case is capable. The declarations of an owner of property are sometimes evidence against one who claims under him: *Ivat v. Finch*, 1 *Taunt.* 141. To prove a bill of sale to be fraudulent, declarations by the vendor at the time of the sale are admissible: *Phillips v. Hamer*, 1 *Esp. Rep.* 357. A letter written by a stranger to a testator, acknowledging the receipt of a will, was admitted as evidence, to show that such a will had been sent by the testator; for here the sending of the acknowledgment was a cotemporary act, and part of the *res gestæ*, free from all suspicion of having been fabricated by the party sending the letter, for a particular purpose, and not the mere private entry or assertion of a stranger, as to the fact of the testator's having previously made a will: 1 *Ld. Raym.* 730. In an action on an insurance effected on the life of the plaintiff's wife, declarations by her, made a few days after the certificate of her health had been obtained, as to the state of her health at the time when the certificate was obtained, and down to the time of the conversation, were held to be admissible in evidence, on a question whether she was in a fit state for insurance, both to show her own opinion as to the state of her health, as well as with a view to contradict the evidence of the surgeon, who had been called as a witness for the plt.: *Aveson v. Kinnaird*, 6 *East*, 193; *Esp. Rep.* 129. What a bankrupt said at the time of his doing an act alleged as the act of bankruptcy, is receivable in evidence, as being part of the *res gestæ*, and as evincing the intent with which the act was done: *Harwd.* 267; *Marsh v. Meagre*, 1 *Stark.* 353; 5 *T. R.* 512; 1 *Rose*, 150. In an action for an assault on plt.'s wife, what the wife said immediately on receiving the injury, and before she had time to devise any thing for her own advantage, is also evidence: *Skin.* 402; *Aveson v. Kinnaird*, 6 *East*, 193; see also 1 *East P. C.* 444; *Rex v. Clarke*, 2 *Stark.* 243; 1 *Stark. Ev.* 308. In an action for crim. con., the declarations of a wife at the time of her elopement, that she fled from immediate terror of personal violence from her husband, seem to be evidence against him, *Aveson v. Kinnaird*, 6 *East*, 193; and where the defence was, that the plt. had connived at his wife's elopement, evidence was received on behalf of the plt. of the wife's declarations as to her intention in going; *Hoare v. Allen*, 3 *Esp. Rep.* 276. Letters from the wife to the husband, written before suspicion of criminal intercourse, are admissible, to show their demeanor and conduct, and whether they were living on terms of mutual affection; but it ought to be strictly proved that the letters were written at a time when the wife was not suspected of misconduct, *Trelawny v. Colman*, 1 *B. & A.* 90; 2 *Stark.* 191, s. c.; *Edwards v. Crock*, 4 *Esp. Rep.* 39. In an action for breach of promise of marriage,

if the deft. relies on the general bad conduct of the plt., a witness may be examined as to representations made to him by third persons: *Foulkes v. Selhoay*, 3 *Esp. Rep.* 236.

*Admission against Interest of Party making Admission.*] It is also a principle of evidence, that if a party who has knowledge of the fact make an entry of it, whereby he charges himself or discharges another \*upon whom he could have a claim, such entry is admissible evidence of the fact contained in it after the death of the party, if he could have been examined as to the fact in his lifetime: *Higham v. Ridgway*, 10 *East*, 109. Where the question was as to the property in a horse seized by the deft. under a heriot custom, a declaration by A. B., a third person, that he had given up his farm and all his stock to the plt., was held to be admissible, for the purpose of proving that the horses belonged to the plt. before the death of A. B.: *Ivat v. Finch*, 1 *Taunt.* 141; and see *Doe d. Brune v. Rawlings*, 7 *East*, 279. A receipt for interest endorsed upon a bond by the obligee himself, is evidence to go to a jury to rebut the presumption of payment arising from lapse of time: *Str.* 826; *sed vide* 1 *Stark. Ev.* 310. Admissions by which parties charge themselves with the receipt of money, are in general allowed in evidence, to prove the fact after they are dead. Old recitals, by which bailiffs have acknowledged the receipt of moneys, are evidence of the payment of such rents, and of the right to receive them, if the bailiff or receiver be dead: 1 *Atk.* 453; 1 *Stark. Ev.* 312. An entry by a steward, in his accounts of the receipt of rent, is admissible in evidence: *Barry v. Bibbington*, 4 *T. R.* 514. In case where a bill of lading had been signed by a master of a vessel, since dead, for goods to be delivered to a consignee, or his assigns, on his paying freight, the document was held to be evidence, to show that the consignee had an insurable interest in the goods: but if in such case the master should guard his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading, it is said, would not be evidence either of the quantity of the goods, or of the property of the consignee: *Haddow v. Parry*, 3 *Taunt.* 303. Entries by a deceased foreman, shopman, or servant of a party, made in the usual course of business, charging such foreman, &c., are evidence for the master; as where the evidence was that, according to the usual course of plt.'s dealings, the drayman came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the drayman set his hand, and that the drayman was dead, and that the entry was in his handwriting, it was held good evidence of a delivery: 1 *Salk.* 285; 1 *Ld. Raym.* 873; *B. N. P.* 282; *Calvert v. Archb. Canterbury*, 2 *Esp. Rep.* 645; 1 *Stark. Ev.* 73. Where the effect of the entry is not to charge the servant, it is not evidence: 2 *Esp. Rep.* 646. Proof must be given that the servant is dead or abroad, and not likely to return: *Cooper v. Marsden*, 1 *Esp. Rep.* 1. By 7 *Jac.* 1, c. 12, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or for work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt, or

obligation of his debtor, for the said debt; or shall have brought an action against him within one year next after the delivery of the wares, or the work done. An attorney's bill, with an endorsement upon it, "March 4th, 1815, delivered a copy to *C. D.*," which endorsement is proved to be in the handwriting of a deceased clerk of the plt.'s (whose duty it was to deliver a copy of the bill), and which is proved to have existed at the time of the date, has been held to be evidence, to prove the delivery of the bill: *Champneys v. Peck*, 1 *Stark*. 404.

The entries of deceased churchwardens of the receipt of moneys for a particular purpose, are evidence of the payments for that purpose: *Stead v. Heaton*, 4 *T. R.* 669. Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in public books of his office, are admissible against his surety to prove the receipt: 3 *B. & B.* 132. Entries in the land-tax collectors' books, stating *A. B.* to be rated for a particular house, and his payment of the sum rated, are evidence to show that *A. B.* was occupier of the premises at the time: *Doe d. Smith v. Cartwright*, 1 *R. & M.* 62. The book of a bursar of a [\*58] a college is \*admissible in evidence as to money paid by him, or received, to the use of a stranger: 1 *Ld. Raym.* 745. An entry made by a deceased man mid-wife, that he had delivered a woman of a child on a particular day, and referring it to his ledger, in which the charge for his attendance was marked *paid*, was held evidence on the trial of an issue as to the age of the child: 10 *East*, 109. The declaration of a deceased tenant, that he held the land under a particular person, is admissible to prove the seisin of that person: *Peaceable v. Watson*, 4 *Taunt.* 16.

In all these cases of proof by entries, it must be shown that the entry was undoubtedly made by the party, 2 *Atk.* 140; evidence by comparisons will not suffice: *Doe d. Webber v. Lord Thynne*, 10 *East*, 206. But if, from the inspection of the books or entries, and the language of them, it appear probable that they were in fact the receiver's books or entries, it seems that will suffice: *ib.*

*Admission by Party with peculiar knowledge of a Fact, having no interest to misstate it.*] Admissions by a deceased party having the peculiar knowledge of a fact, and who had no peculiar interest in stating it, are admissible in evidence, to prove the fact: 7 *East*, 290. The memorandum of a father as to the time of the birth of his son, is evidence to prove the time of such birth, *T. Raym.* 84, *Higham v. Ridgway*, 10 *East*, 120, *Roe d. Brune v. Rawlings*, 7 *East*, 290; but not to prove the place of birth, *R. v. Erith*, 8 *East*, 542; *post*, "*Hearsay Evidence*," "*Pedigree*." Where *A.*, seized of the manors of *B.* and *C.*, causes a survey to be taken of the manor of *B.*, which is afterwards conveyed to *E.*, and, after a long time, there are disputes between the lords of the manor of *B.* and *C.* about their boundaries, this old survey may be given in evidence, *Ld. Raym.* 734; when not, see *ante*, 50. The books of a lessee of a rectory, stating the receipt of letters, have been admitted, after the determination of the lease, as evidence for the impropiator: 4 *Gwill.* 1618; *Bunb.* 46; *sed vide* 1 *Stark. Ev.* 321. Entries made by an impropriate rector, since deceased, are evidence for his successor: *Roe d. Brune v. Rawlings*, 7 *East*, 290; see 1 *Stark. Ev.* 71. So an entry of the receipt of ecclesiastical dues in the books

of a deceased rector, on the ground that he has no interest to misstate the fact: 7 *East*, 290; 2 *Gwill.* 529; 4 *Price*, 218.



## AFFIDAVIT.

*Effect of, in Evidence.*] Affidavits, as we have seen, are evidence against the parties making them, by way of admission as to the facts therein stated, *ante*, 41: but cannot be used for the benefit of such parties: nor is the affidavit of a mere third person admissible in evidence, as the opposite party has no opportunity to cross-examine him, *Gilb. Ev.* 57: however, an affidavit of a party has been admitted, after his death, to prove his marriage, *Sacheverel v. Same*, 1 *Str.* 35; so, perhaps, it would of pedigree or custom, &c.; see *post*, "*Custom*," and "*Pedigree*."

*How proved.—When filed.*] It is said that these affidavits are not entitled to the character of records, as they are made on various, and sometimes trivial occasions in the course of a cause, and are permitted to be moved from the files of the court: *Rees d. Howel v. Bowen, M'Cl. & Y. R.* 390. However, it is usual to admit proof of affidavits, when filed, by the production and proof of an examined copy when used in the same court, in the same cause, from the custody of a person entrusted for that purpose, *Cameron v. Lightfoot*, 2 *W. Bla.* 1190, *Tidd*, 851; as, where affidavits are filed with the clerk of the rules in the K. B., or the secondaries in the C. P., and the office-copy of an affidavit, made in another cause, "in the same [\*59] court has been admitted as good evidence: *Forrest*, 153. But it should be shown, that the copy is an examined one, and has been used in the cause, or some evidence of the swearer's identity: *R. v. James*, 1 *Show*, 399. Though the affidavit be produced from another court, it does not seem necessary to produce the original; but an examined office-copy seems sufficient, on proving that it was actually made by the defendant, or that it was used in the cause, without proving it to have been sworn: *B. N. P.* 238. Where an examined office-copy of an affidavit was produced in a suit at law, purporting to have been made in an equity suit by a person of the same name and description, it was held to be inadmissible as evidence, without proof of its having been used, or of defendant's identity, *Rees d. Howel v. Bowen, M'Cl. & Yo.* 383; but see *Hennel v. Lyon*, 1 *B. & A.* 182. Proof of the party's signature to the affidavit, makes it admissible as a note or letter, without further proof: *B. N. P.* 238.

*How proved, when not filed.*] Such affidavits are only evidenced as such by the production of the originals themselves, and they must be proved to have been sworn by deft.: 3 *Mod.* 36; *B. N. P.* 238. Under the 38th *G.* 3, c. 78, a certified copy from the Stamp Office, of the affidavit of the printer or publisher of a newspaper, is made evidence against the deft., in an action against him, as the proprietor of a newspaper, for a libel, &c. *post*, "*Libel*."

See further, *post*, "*Malicious Arrest.*" As to the necessary affidavit to put off a trial on account of the absence of a material witness, *post*, "*Witness.*"



## AGENT, ACTIONS BY AND AGAINST.

THIS title relates to the rights and liabilities of a general agent: 1. in actions by agent against principal; 2. by agent against third persons; 3. by principal against agent; 4. by third persons against agent.

As to the rights and liabilities of the principal, see "*Principal and Agent.*" See also that title for proof of agency. As to an agent's admissions, *ante*, 53. As to particular agents, as *attorneys, auctioneers, bailees, bankers, carriers, servants, sheriffs, wharfingers, &c.*, see those respective titles in the index and throughout the work.

### I. ACTIONS BY AGENT AGAINST PRINCIPAL.

*Form of Remedy and Pleadings*, 59.

*Precedents*, 59.

*Evidence for Plaintiff*, 60.

*Evidence for Defendant*, 60, 61.

#### *Form of Remedy and Pleadings.*

The form of remedy by an agent against his principal, for commission or money paid, is usually in assumpsit or debt; and there is nothing peculiar in the form of the pleadings. Assumpsit or case lies against the principal, if he employ the agent to dispose of goods which the principal had no right to dispose of, whereby the agent was damaged: 4 *Bing.* 61. Indebitatus assumpsit lies for commission on a *del credere* commission, though the transaction in which the plt. is employed is not complete; especially so after verdict: *Solly v. Weiss*, 2 *Moore*, 420; 8 *Tawnt.* 371, s.c.; *Caruthers v. Graham*, 14 *East*, 578. See further, "*Work and Labour.*"

[\*60]

#### *Precedents.*

##### INDEBITATUS FOR COMMISSION.

(*Commencement and conclusion*, see "Assumpsit,"—"Debt,") for the work and labour, care, diligence, journeys, and attendance of the said plt., by him the said plt. before that time done, performed, given, and bestowed, as the agent (factor or broker) of and for the said def.; and on his retainer and request, and for certain commission and reward due, and of right payable, from the said def. to the said plt., in respect thereof, and being so indebted, &c.

##### QUANTUM MERUIT THEREON.

(*Commencement and conclusion*, see "Assumpsit,") had before that time done, performed, given, and bestowed, other his work and labour, care, diligence, journeys, and attendance, as the agent (factor or broker) of and for the said def., he, the said def., undertook, &c. (*Add a common count for work and labour, &c.*)

## INDEBITATUS FOR DEL CREDERE COMMISSION.

(Commencement and conclusion, see "Assumpsit,"—"Debt,") for certain commissions before that time, and then due and payable from the said deft. to the said plt., for and on account of the said plt. having before then guaranteed the payment of divers large sums to the said deft., upon certain insurances before then effected by the said plt., as the broker and agent of and for the said deft., and at his special instance and request. And being so indebted, &c. (Add a common count for work and labour, &c.)

See precedent of an action by agent, on a policy, 2 Chit. Pl. 178.

*Evidence for Plaintiff.*

*In action for Commission, &c.]* The plt. should prove the retainer, and the work done: see "*Work and Labour*." He must prove a privity of contract between him and deft.: *Schmaling v. Thomlinson*, 6 Taunt. 147; 1 Marsh, 500, s. c. If there be any specific commission agreed on, the same should be proved, if not, and there be any custom or usage as to the amount, the same should be proved: if there be neither of these, plt. should adduce general evidence of the reasonableness of his charges, and which will be for a jury to decide on. In some cases the amount is regulated by statute: *Payl.* 89. It would be as well to prove deft. derived a benefit from plt.'s acts, though not absolutely necessary, if a clear case of agency be made out: see *Brown v. Millner*, 1 Moore, 65. See further, "*Work and Labour*"—"Master and Servant."

*In Action for Money paid by Agent.]* He should prove the payment was made, and that it was so by the express directions of the deft., or else, that it was a payment incidental to the employment, and made in the regular course of it, as a payment for duties, tolls, customs, warehouse-room, &c.; or a payment made to preserve the property from loss, &c.: *Payl.* 79; 3 Bro. P. C. 323; *Curtis v. Barclay*, 5 B. & C. 141; 7 D. & R. 539. If the payment be not warranted by the deft.'s original directions, or by the nature of the employment, proof of a subsequent acquiescence of the deft. would render him liable: 5 Burr. 2727; *Beaves*. 43; *Clayton v. Dilly*, 4 Taunt. 165. See further, "*Money Paid*."

*Evidence for Defendant.*

*In Action for Commission, &c.]* Deft. should endeavour to disprove plt.'s case. He may show that plt. merely trusted to deft.'s honour whether any thing was to be paid, 1 M. & S. 290; or that he derived no benefit whatever from plt.'s acts, proving the plt.'s misconduct or negligence, and its consequences, *Com. Cont.* 271, *Hamond v. Holiday*, 1 C. & P. 384, *Stewart v. Kakle*, 3 Stark. 161, *Hurst v. Holding*, 3 Taunt. 32, *White v. Chapman*, 1 Stark. 113, *Denew v. Daverell*, 3 Camp. 451, 7 \*Moore, 237; hiring himself [\*61] to another, *Thompson v. Havelock*, 1 Camp. 527; or he may show that the plt.'s employment was in an illegal transaction: 2 Wils. 133; *Joseph v. Pebrer*, 3 B. & C. 639; 5 D. & R. 542; *Fomin v. Osweh*, 3 Camp. 357; *Haines v. Busk*, 5 Taunt. 521. See further, "*Work and Labour*," or he may show plt. and himself were partners in

the transaction, *post*, "*Partners*," or that plt. was to be paid on a contingency not yet happened: 5 *Taunt.* 531.

In an action at the suit of a clerk of a company for wages, it is no defence to show that there is an act of Parliament, directing that the company shall be sued in the name of their clerk (the plt.), for the plt. cannot sue himself: *Radenhurst v. Bates*, 3 *Bing.* 471.

*In Actions for Money Paid, &c.]* Deft. should endeavour to disprove plt.'s case. He may prove that the payment was a mere voluntary and officious one, not warranted, as being against deft.'s express directions, or against his interest, and not necessarily incidental to plt.'s employment, *Edmiston v. Wright*, 1 *Camp.* 88, 8 *T. R.* 610, *Grove v. Dubois*, 1 *T. R.* 112; or that the payment was made by reason of plt.'s unskilfulness or misconduct, *Capp v. Topham*, 6 *East*, 392; or in an illegal transaction, *Steers v. Lashley*, 6 *T. R.* 61; *Clayton v. Dilly*, 4 *Taunt.* 165. (See further, "*Money Paid*." )

## II. ACTIONS BY AGENT AGAINST THIRD PERSONS.

*Form of Remedy, Pleadings, and Precedents*, 61.

*Evidence for Plaintiff, ib.*

*Evidence for Defendant, ib.*

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### *Form of Remedy, Pleadings, and Precedents.*

The form of the remedy, pleadings, and precedents, depend upon the subject matter of the cause of action; and no observation as peculiarly relating to this action need be made. The declaration may state the contract to be made with plt. generally, though it appear from it, it was made by him as agent: 2 *Esp. Rep.* 493.

### *Evidence for Plaintiff.*

The evidence as to the subject matter of complaint is the same as in other cases.

*Plaintiff's Interest.]* In an action on a contract, it will suffice to prove that the contract was in terms made with the plt., *Sargent v. Morris*, 3 *B. & A.* 281, *Joseph v. Knox*, 3 *Camp.* 320, *Gardiner v. Davis*, 2 *C. & P.* 49, *Shack v. Anthony*, 1 *M. & S.* 575, *Jesson v. Solly*, 4 *Taunt.* 53, or that plt. has a beneficial interest in the performance of it, as in his lien for commission, &c., *Grove v. Dubois*, 1 *T. R.* 112, *Martini v. Coles*, 1 *M. & S.* 147, 1 *H. Bla.* 81, *Farebrother v. Simmons*, 5 *B. & A.* 333, 1 *Chit. Pl.* 5; or that his nominal principal has repudiated the contract, which plt. had no authority to make, *Langstroth v. Toulmin*, 3 *Stark.* 145; and in which latter case plt. should prove he gave notice to deft., before action brought, of the facts: *Bickerton*

v. *Burrel*, 5 M. & S. 383. In an action for a tort, he should prove he has a beneficial interest, or a special property in the property injured: see 1 *Chit. Pl.* 50, 1. \*When plt. sues as a clerk, &c., [\*62] under an act of Parliament, the act should be proved: see "*Act of Parliament*."

### *Evidence for Defendant.*

The evidence for deft. relative to the subject matter of complaint will be the same as in other cases.

*Plaintiff's Interest.*] Deft. may, on the other hand, show that plt. was, in fact, a mere agent, entering into the contract, or possessing the property assigned as such, without any *beneficial interest*: 3 B. & P. 147; 1 H. Bla. 84; *Rayner v. Linthorne, R. & M.* 325; *Bowen v. Morris*, 2 Taunt. 374.

### III. ACTIONS AGAINST AGENT BY PRINCIPAL.

*Form of Remedy*, 62.

*Form of Pleadings*, 63.

*Precedents*, 63 to 66.

*Evidence for Plaintiff*, 66 to 69.

in general, 66.

in *Action for not Accounting*, 67.

for not paying *Proceeds of Sales, or Moneys*, &c. *ib.*

for selling at an under Price, *ib.*

for selling on Credit, *ib.*

for selling to improper Persons, 68.

for loss of Goods, *ib.*

for Misconduct in employment of Purchase, *ib.*

for not Insuring, *ib.*

for not giving Notice of Material Facts, 69.

against a *Gratuitous Agent*, *ib.*

*Damage*, *ib.*

*Evidence for Defendant*, 69 to 71.

in general, 69.

disputing Principal's Title, *ib.*

fraud, &c. 70.

adoption by Plaintiff of his Acts, *ib.*

in *Action for not Accounting*, *ib.*

for proceeds of Sales, Moneys received, &c. *ib.*

in other Actions, *ib.*

for not Insuring, 71.

against *Gratuitous Agent*, *ib.*

to reduce Damage, *ib.*



*Form of Remedy.*

*Form of Remedy.*] The remedy for a principal against his agent, for breach of his duties, is either by an action on the case, or by assumpsit; but, in general, the latter is the most advisable form of remedy, especially if there has been a receipt of money by the agent: *post*, "*Assumpsit*"—"Case." For not accounting for the proceeds of sales or receipt of money by the agent, whether upon his express or implied undertaking, it is usual to declare against him in a special action of assumpsit, and which is the more convenient remedy than a bill in equity, or action of account: *Carth.* 89; 1 *Salk.* 9, s. c.; *Topham v. Brad-* [63] *dick*, 1 *Taunt.* 572. \*And this form of action may be adopted, however long and complicated the account may be: *Tomkins v. Willshear*, 5 *Taunt.* 431; 1 *Marsh*, 115, s. c., *overruling Scott v. McIntosh*, 2 *Camp.* 238. Where there is evidence of receipt of money, the same may be recovered under the count for money had and received. Or misapplication of money received by the agent for his principal, whether for a particular purpose, *Willes*, 404, or otherwise, or at all events, where a refusal to account renders the debt absolute, debt or indebitatus assumpsit lies, 11 *Mod.* 92, 12 *ib.* 521; *Sty.* 287; and, even though paid for an illegal purpose, if not so applied: 1 *B. & P.* 3, 296; 7 *Ves.* 473; *Taylor v. Lendey*, 9 *East*, 49. Assumpsit lies in all cases against a *del credere* agent: *Foster v. Allanson*, 2 *T. R.* 479. Assumpsit does not lie, however, where there is a covenant to account, 2 *Str.* 1027, the remedy being on the deed, *ib.*; unless a balance be agreed to and debt. promise to pay it: *Foster v. Allanson*, 2 *T. R.* 479.

*Form of Pleadings.*

*Form of Pleadings.*] When a party declares specially, whether he proceed in case or assumpsit, the contract must be stated to raise the duty and employment; therefore, in an action for not insuring an undertaking for a conditional voyage to a place under certain contingencies, will not support an undertaking for an absolute voyage to that place: *Lopes v. De Tastet*, 1 *B. & B.* 544: And, where the debt. acts under a *del credere* commission, the fact of such a commission being contracted to be paid must be stated in the declaration; and, where it was merely alleged that the debt. was indebted to the plt. in respect of goods delivered by him to the debt. to be sold and disposed of, and it appeared in the evidence that the debt. acted under a *del credere* commission on guaranteeing the solvency of the purchasers, it was held, that the declaration was insufficient, by reason of its omitting to state that the debt. was to receive a *del credere* commission, *Gill v. Comber*, 1 *Moore*, 279; but, in *Grove v. Dubois*, 1 *T. R.* 112, *Bise v. Dickason*, *ib.* 285, it was considered that the amount of the value of the goods might be recovered from an agent of this nature under the count for goods sold and delivered. In an action against an agent, with a special count for not paying over the proceeds of goods sold by him, the receipt of the proceeds should be averred: *Serra v. Wright*, 6 *Taunt.* 45; *Varden v. Parker*, 2 *Esp.*

*Rep. 710.* But the moneys received are recoverable under the common count for money had and received, *supra*, 62.

In an action on the common counts, deft. may claim *deductions*, &c. without a plea or notice of set-off, though it is always safest to give one, and is necessary where he has a set-off for commission.

### *Precedents.*

#### DECLARATION IN ASSUMPSIT AGAINST AGENT EMPLOYED TO SELL GOODS, &c. FOR NOT ACCOUNTING FOR THEM.

For that whereas, heretofore, to wit, on, &c. (*any day about time of delivery*), at, &c. (*venue*), in consideration that the said plt., at the special instance and request of the said deft., had delivered to the said deft. divers goods and chattels; to wit (*here describe the goods, as in trover, &c.* *It does not appear necessary to describe them with exact number, &c.*), of the said plt., of great value, to wit, of the value of £100 (*state a sufficient sum*), to be sold and disposed of by the said deft., for the said plt.; he, the said deft., undertook, and then and there faithfully promised the said plt., to render a just, true, and reasonable account of the said goods and chattels to the said plt., whenever he, the said deft., should be thereunto afterwards requested. And the said deft. then and there had and received the said goods and chattels of and from the said plt. for the purpose aforesaid, yet the said deft., not regarding his said promise and undertaking, but contriving and fraudulently intending to injure the said plt., hath not rendered to the said plt. a just, true, and reasonable [\*64] or \*other account of the said goods and chattels, or any part thereof, although the said deft., afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, was requested by the said plt. so to do; but the said deft. hath hitherto wholly refused, and still wholly refuses, so to do. (*It is usual to add a count on an executory consideration that plt. would deliver, and stating delivery accordingly, and a sale and receipt of proceeds, but this is unnecessary. Add counts for goods sold, money counts, and an account stated.*)

#### THE LIKE FOR NOT TAKING DUE CARE OF THE GOODS.

And whereas, also, heretofore, to wit, on, &c., at, &c., in consideration that the said plt., at the like special, &c. of the said deft., had delivered to the said deft. divers other goods and chattels, to wit, &c., of great value, to wit, of the value of £60, of like lawful, &c., he, the said deft., undertook, and then and there faithfully promised the said plt., to take due and proper care thereof. Yet the said deft., not regarding his said last-mentioned promise, &c., but contriving, &c., did not, nor would take due and proper care of the said last-mentioned goods and chattels, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on &c. the said last-mentioned goods, &c. became and were wholly lost to the said plt., to wit, at, &c. (*See directions in preceding precedent.*)

#### THE LIKE FOR NOT RETURNING GOODS WHICH DEFT. DID NOT SELL.

And whereas, also, heretofore, to wit, on, &c., at, &c., in consideration that the said plt., at the like special, &c. of the said deft., had delivered to the said deft. divers other goods and chattels, to wit, &c., of great value, to wit, of the value of £100, of like lawful, &c., to be sold and disposed of by him, the said deft., for the said plt. for a certain reasonable reward, to be therefore paid by the said plt. to the said deft. in that behalf, he, the said deft., undertook, and then and there faithfully promised the said plt., that, in case he did not sell and dispose of the said last-mentioned goods and chattels, or any part thereof, he would return the same, or such as were not sold and disposed of, to him, the said plt., when he, the said deft., should be thereunto afterwards requested. And the said plt. in fact saith, that although the said deft. hath not sold and disposed of the last-mentioned goods and chattels, of great value, to wit, of the value of £60, yet the said deft., although he was afterwards, to wit, on, &c. aforesaid, at, &c., aforesaid, requested by the said plt. so to do, did not, nor would return the said last-mentioned goods and chattels to the said plt., or any or either of them, or any part thereof, but the said deft. so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c., aforesaid. (*Add common counts.*)

**AGAINST AN AGENT ON A PROMISE NOT TO SELL UNDER A FIXED PRICE, AND TO ACCOUNT FOR SALE, &c.**

For that whereas, heretofore, to wit, on, &c., at, &c., in consideration that the said plt., at the special instance and request of the said deft., had then and there retained and employed him, the said deft., in that behalf, to sell and dispose of divers, chaises, gigs, and other carriages, of and for him, the said plt., at and for certain prices respectively, to be therefore stated to him, the said deft., by the said plt., he, the said deft., undertook, and then and there faithfully promised the said plt., not to sell the said chaises, &c. under the said prices, and to render a just and true account of the sales by him made, as agent as aforesaid, and to deliver up to him, the said plt., such of the said chaises, &c., as should remain unsold by him, the said deft., when he, the said deft., should be thereunto afterwards requested; and, although he, the said deft., then and there had and received divers, to wit, fifty chaises, fifty gigs, and fifty other carriages, of and from the said plt., as such agent, as aforesaid, and he, the said plt., stated the prices of the same, respectively, to him, the said deft.; yet the said deft. thereby craftily and subtly deceived and defrauded the said plt. in this, to wit, that he, the said deft., from time to time, and at all times after the making of his said promise and undertaking, without the knowledge and against the will of him, the said plt., sold and disposed of divers, to wit, thirty of the said last-mentioned chaises, &c. at much smaller prices than the said prices so stated to him; and the said deft., contriving and intending, &c., hath not, although afterwards, to wit, on, &c. aforesaid, and often times before and since, to wit, at, &c., aforesaid, requested by the said plt. so to do, as yet rendered a just [\*65] and true or other account of the said sales, or delivered up to him, the said plt., the residue of the said chaises, &c. which remained unsold by him, the said deft., as aforesaid, but hath wholly neglected and refused, and still doth neglect and refuse, so to do, to wit, at, &c., aforesaid. (*Add goods sold, money counts, and account dated.*)

**COUNT AGAINST AGENT FOR NOT SELLING AT THE BEST PRICE.**

And whereas, also, heretofore, to wit, on, &c., at, &c., in consideration that the said plt., at the like special, &c., of the said deft., had delivered to the said deft., to sell and dispose of for the said plt., divers other large quantities, to wit, &c., of cloth and kerseymere, of great value, to wit, &c., he, the said deft., undertook, &c., to perform his duty in and about the sale and disposal of the same cloth and kerseymere; and, although the said deft. then and there accepted and received the said last-mentioned cloth and kerseymere for the purpose aforesaid, and it thereupon then and there became, and was, the duty of the said deft. to use due endeavours to sell and dispose of the same for the best prices that could have been obtained for the same; yet the said deft., not regarding, &c., did not, nor would, use due endeavours to sell and dispose of the said last-mentioned cloth and kerseymere, for the said plt., for the best prices that could have been obtained for the same, but wholly neglected so to do; and afterwards, to wit, on, &c., aforesaid, and on divers, &c., so improperly conducted himself with respect to the said last-mentioned cloth and kerseymere, that the same has produced much less, to wit, the sum of £200 less for the use of the said plt., than the same would have produced if it had been duly sold by the said deft. for the said plt., contrary to the said last-mentioned promise and undertaking of the said deft., to wit, at, &c., aforesaid.

**AGAINST AN AGENT FOR NOT TAKING DUE CARE OF GOODS DELIVERED TO HIM AT DIFFERENT TIMES, AND SELLING THEM UNDER VALUE, AND BY BARTERING THEM, &c.**

For that whereas, heretofore, to wit, on, &c., at, &c., in consideration that the said plt., at the special instance and request of the said deft., would [from time to time] retain and employ him, the said deft., to sell and dispose of cloth and kerseymere of the said plt., to be delivered by the said plt. to the said deft. for that purpose, for commission and reward to the said deft. in that behalf; he, the said deft., undertook, and then and there faithfully promised the said plt., to take due and proper care and diligence in about the selling and disposing of such cloth and kerseymere, and the said plt., in fact, says, that he, confiding in the said promise and undertaking of the said deft., afterwards, to wit, on, &c. aforesaid, and on divers other days and times afterwards, and before the commencement of this suit, to wit, at, &c., aforesaid, did retain and employ him, the said deft., to sell and dispose of divers quantities of cloth and kerseymere for the said plt., and during that time, to wit, on, &c., first aforesaid, and on divers, &c., at, &c., delivered to the said deft. divers large quantities, to wit, fifty pieces of cloth and five hundred pieces of kerseymere, of the said plt., of great value, to wit, of the value of £—, for the purpose aforesaid, and the said deft., on those several days and times, accepted and received the said quantities of cloth and kerseymere for the purpose aforesaid; and, although it thereupon became, and was the duty, of the said deft., to use care and diligence in and about the endeavouring to sell and dispose of the said cloth and kerseymere, for good and sufficient prices, and although the said deft. could and might, and ought to have sold the said cloth and kerseymere for good and sufficient prices, whereof he, during all the time aforesaid, had notice, to wit, at, &c., aforesaid, yet the said deft., not

regarding his said promise and undertaking, so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt. in this behalf, did not, nor would use due and proper care and diligence in and about the endeavouring to sell and dispose of the said cloth and kerseymere for good and sufficient prices, but wholly neglected so to do, and also afterwards, to wit, on the said several days and times, wrongfully and injuriously bartered and exchanged divers large quantities of the said cloth and kerseymere, for other goods, wares, and merchandises, of much less value than the said cloth and kerseymere, contrary to the said promise and undertaking of the said deft., and his duty in that behalf, to wit, at, &c. aforesaid.

FOR SELLING TO PERSONS UNFIT TO BE TRUSTED.

\* And whereas, also, heretofore, to wit, on, &c., at, &c., in consideration that [66] the said plt., at the like special, &c., would retain and employ the said deft. to sell and dispose of divers other quantities of cloth and kerseymere of the said plt., on commission, he, the said deft., undertook, &c., not to sell or dispose of the said last-mentioned cloth or kerseymere, to any person or persons unworthy of credit, in the way of trade and dealing, and unfit to be trusted with goods on credit; and the said plt., in fact, saith, that he, committing, &c., did afterwards, to wit, on, &c., last aforesaid, and on divers, &c., at, &c., retain and employ the said deft. to sell and dispose of such cloth and kerseymere for the said plt., and during that time, and on divers, &c., and before the commencement, &c., to wit, at, &c., delivered to the said deft. divers large quantities, to wit, &c., of great value, &c., for the purpose last aforesaid, and the said deft., on the several days and times last aforesaid, accepted and received the said last-mentioned cloth and kerseymere for the same purpose; yet the said deft., not regarding, &c., afterwards, to wit, on, &c., last aforesaid, and on divers, &c., at, &c., aforesaid, wrongfully sold and disposed of the said last-mentioned cloth and kerseymere, for divers sums of money, to divers persons respectively, to wit, to Messrs. T., B., and D., and divers other persons respectively, unworthy of credit in the way of trade and dealing, and unfit to be trusted with goods on credit, by means whereof the price of the said mentioned cloth and kerseymere remains, and is, wholly in arrear and unpaid to the said plt., and he is likely wholly to lose the same, to wit, at, &c. aforesaid. (*Add money counts and accounts stated, &c.*)

AGAINST AN AGENT EMPLOYED TO SELL GOODS ON HIS PROMISE TO USE DUE ENDEAVOURS TO OBTAIN PAYMENT OF PROCEEDS.

And whereas, also, heretofore, to wit, on, &c., aforesaid, at, &c., aforesaid, in consideration that the said plt., at the like special, &c. of the said deft., had retained and employed him, the said deft., for reward to him in that behalf, to sell and dispose of certain other goods, wares, and merchandises of the said plt., of great value, to wit, of the value of £100, of lawful money, in certain parts beyond the seas, for the said plt., he, the said deft., undertook, and then and there faithfully promised the said plt., to use due endeavours to obtain payment of the money for which the said last-mentioned goods, wares, and merchandises, should be sold, for the said plt., and, although the said deft. afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, sold the said last-mentioned goods, wares, and merchandises, for, and on account of the said plt., for a large sum of money, to wit, for the sum of £—, of like lawful money, at, &c., aforesaid; yet deft., not regarding his said promise and undertaking, so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt. in this behalf, did not use due endeavours to obtain payment of the said moneys for which the said last-mentioned goods, wares, and merchandises were so sold as aforesaid, but wholly neglected and refused so to do; and by means and in consequence thereof, the said plt. hath not as yet received the proceeds of the last-mentioned goods, wares, and merchandises, and is likely to lose the same, to wit, at, &c., aforesaid.

*Evidence for Plaintiff.*

*In General.*] Plt. should, in the first place, prove the deft.'s retainer and employment as stated in the declaration: *Lopez v. De Tastet*, 1 B. & B. 544. If the same was by any written document between them, it should be produced and proved in the usual way. If the damage resulted from a deviation from specific orders, such orders should be

proved, *Cowp.* 395; and so, if it resulted from not following the usage of trade and dealing: the usage should be proved: *Smith v. Lascelles*, 2 *T. R.* 188, *Cowp.* 488, 4 *Burr.* 2061; 6 *T. R.* 12. In general, in order to render an agent liable, plt. may show that he did not exert the same vigilance, care, and diligence, as a prudent person would exert, and which is a question for a jury: see *Kilsby v. Williams*, 5 *B. & A.* 820, *Paterson v. Gandasequi*, 15 *East*, 62. Even though the agent is bound to adopt the usual course of trade, plt. may still, to prove deft.'s [\*67] liability, show that he adhered more closely to it \*than a prudent and skilful agent would have done, and thereby occasioned a loss: 2 *Wils.* 325; *Smith v. Lascelles*, 2 *T. R.* 188, *Yelv.* 202. And, where there are specific instructions, or, in the absence of them, an usage of trade, and plt. sustains a loss by deft.'s departure from them, the circumstance of deft.'s intending a benefit to his principal by such departure will not avail him, *Catlin v. Bell*, 4 *Camp.* 183, *Dyer*, 161, 1 *H. Bla.* 159, *Cowp.* 395; though, on the other hand, he will, in general, be safe if he pursue the instructions of his principal: *Moll.* 329. Any admission made by deft. of his liability, should be proved: *ante*, "*Admissions.*"

*In an Action for not accounting for Goods*, plt. must, in addition to the foregoing evidence as to retainer, prove the delivery of the goods to deft. in the character of agent, as alleged in the declaration: *post*, title "*Principal and Agent.*" Proof of the delivery or consignment of goods will vary according to the fact. If there was an invoice, it should be proved, *post*, "*Secondary Evidence.*" The value of the goods should be proved: if the deft. has sold the goods, or any part of them, the sale should be proved: the plt. should prove a request to account, though it may be proved after a reasonable time, *Topham v. Braddick*, 1 *Taunt.* 572, 12 *Mod.* 444, and also, if possible, the receipt of the proceeds of sale: the purchaser will be a good witness for this.

In an action to recover the proceeds of sales or moneys received by the deft., which would be recoverable under the count for money had and received, it will, in addition to proof of the receipt of the money, in general, be necessary to prove the transaction is closed, *Varden v. Pasker*, 2 *Esp. Rep.* 710, *Lucas v. Groning*, 1 *Stark.* 392; or else show that it is the fault of the agent that it is not: *ib.* Letters written by the agent to the principal will be evidence against him; and, if he has rendered an account, he will be bound by it. *Shaw v. Picton*, 4 *B. & C.* 729. A sale of the goods, and actual receipt of the money for them, will be presumed, when a reasonable time has elapsed after the deft.'s refusal to account, *per* *Ld. Ellenb.*, *Hunter v. Welsh*, 1 *Stark.* 224; and plt. will recover on proving their value: *ib.* Proof of deft. being an agent under a *del credere* commission, supersedes the necessity of proving the receipts of the proceeds: *Paley*, 76, *Grove v. Dubois*, 1 *T. R.* 112; *Bise v. Dickason*, *ib.* 285. See further, as to the proof against an agent for money had and received, *post*, "*Money Had and Received.*" If the deft. has been guilty of misconduct, and he seeks to deduct the amount of his commission on the sales from plt.'s claim, plt. should prove such misconduct: *White v. Chapman*, 1 *Stark.* 113; *ante*.

*In an Action for selling at an under Price*, if the deft. received any specific instructions as to price, they should be proved: *Dufresne v. Hutchinson*, 3 Taunt. 117, *Willes*, 407, 3 B. & P. 489. So, if there was any custom or usage of trade. If there were no specific instructions, plt. should prove the value of the goods and the sale of them. Prove retainer of deft. and delivery of goods.

*In an Action for selling on Credit*, if deft. has received specific instructions, they should be proved; otherwise it should be proved that the usage of trade was against selling on credit: 12 Mod. 514; *Scott v. Surman*, *Willes*, 407. As, an usage of this kind in the sale of stock, *Wiltshire v. Sims*, 1 Camp. 258, *Lefevre v. Lloyd*, 5 Taunt. 749, 12 Mod. 514; or in a sale by an auctioneer, by auction, *Brown v. Staton*, 2 Chit. R. 353. Proving deft. bartered the goods would make him liable: *Guerriero v. Peile*, 3 B. & A. 616. Though there be no specific instructions or usage against selling on credit, plt. will render deft. liable by proving the credit given was unreasonable and not customary: *Buls*. 183. Prove the retainer and delivery of the goods.

\*If the agent has taken a security instead of cash, plt. may show [\*68] the security was such as would give him unnecessary trouble or risk: *Yelv*. 202. If a broker employed to sell goods, sell them for a bill at a given date, and draw on the buyer for the amount, he is answerable on the bill to his principal, *Lefevre v. Lloyd*, 5 Taunt. 749; or if he take a security payable to himself from the purchaser, and give his own security to the principal for the net proceeds, he will be liable, *Simpson v. Swan*, 3 Camp. 291; and he will be liable for a loss arising from mixing up the proceeds of the sale with his own at his banker's: 11 Ves. 382; *R. & M.* 382.

*In an Action for selling to a Person unfit to be trusted*, plt. should show the party was in reputed bad circumstances at the time of the sale, 12 Mod. 514, *Wiltshire v. Sims*, 1 Camp. 258; or that such was known to deft.: the circumstance of deft.'s selling his own goods for ready money would be a strong inference against him, *ib.* Prove the retainer and delivery of goods.

*In an Action for the Loss of Goods*, if the agent did all that by his industry he could for their preservation, *Vere v. Smith*, 1 Ven. 121, and kept them with the same care he did his own, *Coggs v. Bernard*, 2 Ld. Raym. 917, *Maltby v. Christie*, 1 Esp. Rep. 341, he will not be liable, and proof must be adduced accordingly against this. An agent is not liable in case of fire, 2 Mod. 100, robbery, *Co. Lit.* 88, b., or any other accidental damage happening without his default: *ib.* and *Rol. Ab.* 124. However, if the plt. can prove the loss happened by previous neglect, though not the immediate fault of the agent, he will render the deft. liable: as, if goods be burned in a warehouse, in the removal of which there has been an improper delay: 6 Ves. 496. Prove the retainer and delivery of goods.

*In Action for Misconduct when employed to purchase.*] The re-

tainer must be proved: it is the duty of an agent to buy for his principal in the most beneficial manner, and, as in all other cases, to exercise proper skill, &c.; and he will be liable whenever he deviates from his orders in price, quality, or kind: *Paley*, 28 to 36; plt. should, therefore, adduce his proof accordingly. Where an agent grossly misstates the quantity of goods purchased by him, and such misstatement be productive of loss to his employer, he would be liable, though the agent thereby derived no additional pecuniary benefit: *Ld. M. of London v. Brandon*, *Holt*. 438, 441, *n.* Where plt. ordered tobacco of the best quality, and the agent purchased it of so inferior a description that a person to whom it was shipped brought an action against plt. and recovered, it was held, that plt. could recover from his agent the whole damage that he had suffered by his neglect, *Mainwaring v. Brandon*, 8 *Taunt*, 202; and it will be no waiver of principal's right though he may have received a bought note not stating it to be of the best quality: *ib.* Plt. may show he sustained a loss in consequence of deft. himself being the seller. 3 *Chit. Com. L.* 217.

*In Action for not Insuring*, after proof of the retainer, plt. should prove his interest in the property to be insured: *Park Ins.* 4; *Delaney v. Stoddart*, 1 *T. R.* 24. The agent must insure where it has been the course of dealing to do so; or where the principal, having effects in the agent's hands, orders him to insure, or where bills of lading are sent to the agent conjointly with orders to insure, he must do so, though his principal have mortgaged to him the subject of insurance, and the mortgage have become absolute. But he is not bound to insure, at all events, but only to do his utmost to effect it: *Smith v. Lascelles*, 2 *T. R.* 187. And, in all cases where the agent makes an ineffectual insurance, or neglects to insure, he will be liable in the same manner as if he had been the insurer himself: *Mal.* 86; *Beawes*, 43; *Delaney v. Stoddart*, 1 *T. R.* 24; *Wallace v. Telfair*, 2 *T. R.* 188, *n.* \*Therefore, if an agent omit to insert a clause usual in the policy, and loss ensue by the omission, he will be liable for the sum directed to be insured, deducting the premium: *Mallough v. Barker*, 4 *Camp.* 150. But he will not be liable to an action for neglecting to insert in a policy a liberty to carry simulated papers not mentioned in his written instructions, though it may have been verbally communicated to him that simulated papers were to be used in the voyage, *Fomin v. Oswell*, 3 *Campb.* 357; or wording the clause so as not to include certain goods intended to be insured, he will be liable: *Park v. Hammond*, 2 *Marsh*, 189; 6 *Taunt.* 495, *s. c.*

*In Action for not giving Plaintiff Notice* of a fact known by the deft., and which ought to have been communicated to plt., and for the want of which a loss is sustained to plt., he should prove deft.'s knowledge of that fact, and that it was a material one: such as proving a sale by deft. without information to plt., 13 *Vin. Ab.* 4; or a bill of exchange remitted to deft., *Beawes*, 431; or a notice of insolvency of an underwriter, 2 *Camp.* 546, *n.* As to attorney not giving notice, *post.* The retainer should be proved.

*In an Action against a gratuitous Agent*, as he is not liable for a mere nonfeasance, plt. must prove he has been guilty of misfeasance: 2 *Ld. Raym.* 909; *Else v. Gatwaed*, 5 *T. R.* 143; *Wilkinson v. Coverdale*, 1 *Esp. Rep.* 74. As, if an attorney should undertake gratuitously to conduct a cause, and he did so conduct it, plt. should show he did it in such a gross manner as to create the loss. And, in all cases, in order to render a gratuitous agent liable, plt. should show he did not pay the same attention to the trust as he reasonably would for himself in his own affairs: 3 *Chit. Com. Law*, 215. Mixing money of principal's with his own at bankers, and they fail, he is liable for the loss: 1 *J. & W.* 241; *Robinson v. Ward, R. & M.* 274; *Maud v. Waterhouse*, 2 *C. & P.* 579. The retainer should be proved.

*Damage.]* The plt.'s damage must be proved. In general, it is not necessary to prove special damage, and, if plt. makes out his case, he will be entitled to nominal damages at all events. If plt. seeks to prove an actual damage, a loss of some legal benefit should be proved; proof of the loss of a probable advantage is not sufficient: *Webster v. De Tastet*, 7 *T. R.* 157; *Park. In.* 303. *ante*. The plt. will be entitled to recover the amount of any direct loss by the goods, *Moll.* 327, *Cr. J.* 265, as well as any sums expended by him in reparation to others, and the measure of damages ought to be the damages and costs recovered in the action against the plt.: *Mainwaring v. Brandon*, 8 *Taunt.* 208. But the debt to be recovered from the agent is the balance only of money received by him after deducting all just allowances, though not pleaded by way of set-off, 4 *Burr.* 2133; but he will not be liable for interest if he applies the money to his own use, or even mixes it up with his own at his banker's: *Rogers v. Taylor*, 2 *Esp. Rep.* 704; *Robinson v. Ward, R. & M.* 274. And, where the goods are forfeited by the agent's making improper entries at the Custom House, the extent of his liability is said to be the *cost price* of the goods, if to be exported, and the sale price if they are to be imported, with reference to the country where the seizure is made: *Mal. Lex. Mer.* 83; 13 *Vin. Ab.* 4. In actions against agents for not insuring, *ante* 68, plt. can only recover according to his interest, which, as well as the loss, he must establish in proof: *Park. Ins.* 4; *Delaney v. Stoddart*, 1 *T. R.* 24; *post*, "Policy." The amount of the damages which the plt. will be entitled to recover, will be the sum directed to be insured, deducting the premiums paid: *Mallough v. Barker*, 4 *Camp.* 150. As to what deft. may deduct, *post*, 71.

#### *Evidence for Defendant.*

*In general*, deft. should be prepared to disprove plt.'s case. A variance\* in the declaration, in stating the retainer as an abso- [\*70] lute when it was only a conditional one, would be ground of non-suit: *Lopes v. De Tastet*, 1 *B. & B.* 544. Deft. may show in defence, that he performed his employment; and, if the terms of the employment are in dispute, he should be prepared to prove the nature of them. In an action for misconduct, he may show he pursued the express orders of



his principal, or, in the absence of them, that he pursued the usual and accustomed course of trade and dealing, proving the same. Proving his good intentions towards principal forms no defence, *ante*, 67.

"It is a settled rule of law that an agent shall not be allowed to dispute the title of his principal, and that, therefore, he shall not, after accounting with his principal and receiving money in that capacity, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but for that of some third person:" *per Abbott, C. J., Dixon v. Hamond*, 2 B. & A. 313.

*Fraud.*] Deft., in an action for misconduct, may also show that the transaction in which he was employed was fraudulent, but he must show that it was part of the employment to defraud; as in the case of defrauding by the non-payment of duties, for, if he merely show that the duties were not paid, it will be insufficient: *Catlin v. Bell*, 4 Camp. 184; see *Wilkinson v. Loudonsack*, 3 M. & S. 117; *Gross v. La Page*, Holt, 105-7. He may also show that his compliance with his instructions would have been a fraud upon others: as, where an agent was employed to sell certain articles, and the condition of the sale purported that the highest bidder should be the purchaser, but the agent had private instructions not to sell under a certain sum, in which case it is sufficient if he sold to the highest bidder, though for less than the sum to which he was secretly limited: *Bezwel v. Christie*, Coup. 395.

*That Principal has adopted his Acts.*] Though deft. has not complied with plt.'s instructions, he may show plt. has adopted his acts, as where deft. has put out plt.'s money on interest, and he receives it for any time with knowledge, it will be an affirmation of the transaction, and will exempt the agent from liability if the security fail: 2 *Freem. R.* 48; *Eq. Ca. Abr.* 708. When an agent deviates from his instructions, the principal has a right, as soon as he knows of the deviation, to repudiate what he has done; but, if he does not mean to accede to what has been done, he is bound immediately to take steps to notify his dissent: *per Bayley, J.*, 2 D. & R. 270. Deft. may also show that plt. did not disclose to him facts within his (principal's) knowledge, and whereby the loss occurred: *Mayhew v. Eams*, 3 B. & C. 603.

*In an Action for not Accounting*, *ante*, 67, he should be prepared to disprove plt.'s case, and show he has duly accounted.

*In an Action to recover the Proceeds of Goods* or moneys received by him, *ante*, 87, he should disprove, if possible, the plt.'s case as to the receipt of such moneys. He may prove the transaction is not closed, *ante*, 67; he may show he has paid over the money to another person, and that he had authority to do so; the *onus* lies upon him to show that he had such authority: *Smith v. Watson*, 2 B. & C. 407, 3 D. & R. 751. Deft. may also prove that he remitted the money received by him for his principal in the usual way, and it will be a sufficient defence, therefore, where plt. engaged deft. to receive money for him, and remit a bill for it by post, which the agent did, but the latter was suppressed

and the money upon the bill received at the bankers by some unknown person, the agent is discharged: *Warwick v. Noakes*, *Peak. Rep.* 68. And, where a steward, in receiving rents, takes bills from persons of reputed credit, yet he will be excused, though the bills be dishonoured and the money lost: 3 *\*Atk.* 480. And where a banker, [\*71] who had received bills of exchange for the purpose of procuring payment, took the acceptor's check instead of money, yet he was held discharged, though the check was dishonoured, as it appears that the banker only pursued the usual course of business: *Russell v. Hankey*, 6 *T. R.* 12. Where an agent takes securities, they must be such as principal can avail himself of by reasonable diligence and without risk or trouble: 1 *Buls.* 104; *Yelv.* 202; *Winch.* 53. And an agent residing abroad may show that money was subsequently depreciated by edict, &c.: *Moll.* 424. As to fraud, *ante*, 70.

*In an Action for Purchasing damaged Goods*, he may show that the goods were damaged after, and not before, he bought them: *Mal.* 84.

*In Actions for Selling on Credit, or to a Person unfit to be trusted, or for the Loss of Goods*, the evidence for deft. may be collected from *ante*, 67-8.

*In an Action for not Insuring*, it will be no defence to him to show that he was directed to insure against *British* capture, for that will not render the whole insurance void, but only *pro tanto*: *Glaser v. Cowie*, 1 *M. & S.* 52. Deft. may show that his promise to insure was merely gratuitous; and that he never acted on such promise; for, if he once actually interfered, he would be liable for gross neglect, *Wilkinson v. Coverdale*, 1 *Esp. Rep.* 74, *Marsh*, 208; or that he had no effects in his hands, and declined from the first, *Smith v. Lascelles*, 2 *T. R.* 189; and, if bills of lading were consigned to him, that he refused at the same time to accept them, *ib.* In an action against an agent for a failure in making assurance, as it is a principle that he stands in the place of an insurer, he is entitled to any defence which an insurer could have made, *Park*, 4, *Delaney v. Stodart*, 1 *T. R.* 24; he may, therefore, avail himself of a deviation in the voyage, *ib.*, 22; or the illegality of the intended insurance, *Webster v. De Tastet*, 7 *T. R.* 157. And, if the neglect complained of be, that by the non-communication of a material fact to the underwriters in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made it impossible to get the insurance effected: *Anon. Cor. Chambre, J. York Sum. Assizes*, 1808.

*In an Action against a gratuitous Agent*, he should be prepared to show he was one, and that he acted to the best of his knowledge, and was not guilty of gross negligence, but took the same care of plt.'s goods as of his own; and, where a general merchant entered goods of his own and other person's at the Custom House, under a wrong entry, whereby they were forfeited, it was held that he was not liable, as he received no

reward, and was not of a profession that implied skill: *Shiells v. Blackburne*, 1 H. Bl. 158.

To reduce damages, deft. is entitled to deduct all just allowances which he has a right to retain out of the sum demanded, without pleading, or giving notice of set-off: *Dale v. Sollet*, 4 Burr. 2133. As to such charges, see *ante*, 69. Deft. may as well prove, if possible, he acted with an intention of benefiting principal, but this will not afford a ground for defence, *ante*, 67.

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#### ACTIONS AGAINST AGENT, BY THIRD PERSONS.

*Form of Remedy, Pleadings, and Precedents*, 72.

*Evidence for Plaintiff*, 72 to 75.

*Actions against Agent contracting on his own Account*, 72.

where Principal unknown, *ib.*

where no apparent or responsible Principal, *ib.*

where Agent has exceeded his Authority, or acted under an Authority Principal had no right to give, 74.

for Money had and received, *ib.*

for Torts, *ib.*

*Evidence for Defendant*, 75.

*Action against Agent contracting on his own Account*, *ib.*

where Principal was unknown, *ib.*

where Agent has exceeded his Authority, or acted under an Authority Principal had no Right to give, *ib.*

for Money had and received, *ib.*

for Torts, *ib.*

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#### *Form of Remedy, Pleadings, and Precedents.*

THERE is no peculiar form of remedy in an action at the suit of third persons against an agent, he being liable only as a principal, and not as agent: consequently, there are no forms of pleadings or precedents. For those relative to attorneys, auctioneers, bailees, carriers, and other such particular agents, see those titles.

#### *Evidence for Plaintiff.*

*In Action against Agent Contracting on his own Account.*] The proofs relative to the subject matter of the action in this, as well as the other following actions against agents, will be similar to those against other parties in general. Plt. should show that the deft. personally contracted, either by parol or under seal, for the performance of the agreements in his own name; and deft. will, in general, be responsible,

though he describe himself as agent, and though the principal be known. Where an agent employed to wind up the concerns of a person deceased, gave an undertaking to a creditor of the deceased to furnish money to meet an acceptance which such creditor had given, in furtherance of an arrangement for delaying payments, in hopes that funds might be forthcoming, he was held liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, nor had received any funds: *Maud v. Waterhouse*, 2 C. & P. 579. Where *A.* employs *B.* to sell goods for him, and *C.*, as *B.*'s broker, procures a purchaser, and draws a bill for the amount, payable to *A.*, which is accepted by the purchaser, but dishonoured: it was held that *C.* is answerable to *A.*, as drawer of the bill: *Lefevre v. Lloyd*, 1 Marsh, 318; 5 Taunt. 749, s. c. An agent to a country bank, to whom plt. sent a sum of money, in order to procure a bill upon London, drew, in his own name, for the amount, upon the firm in London, the two firms being the same: held, that the agent was liable, as drawer, although plt. knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank to which the \*agent paid [\*73] over the money; *Leadbitter v. Farrow*, 5 M. & S. 345. And if an agent expressly stipulate by a written agreement, or under seal, though he describes himself as an agent, and acting on behalf of another, whom he mentions, he will be liable. Therefore, where an agent, by a written agreement, expressed to be made by himself, on behalf of *A. B.* of the one part, and the plt. of the other, stipulated to execute a lease of certain premises to the plt., he was held to be personally liable; and it was said by Best, C. J., that there was no distinction between agreements of this nature by parol or by deed: *Norton v. Herron*, R. & M. 229; 5 Moo. 278. And, where attorneys gave the following written undertaking, "We, as solicitors to the assignees, &c., undertake to pay the landlord his rent, provided it does not exceed the value of the effects distrained," they were held personally liable: *Burrell v. Jones*, 3 B. & A. 47. And, if an attorney personally undertakes to withdraw a record, he will be liable: *Iveson v. Conington*, 1 B. & C. 160; 2 D. & R. 307; 3 D. & R. 503; *Spittle v. Lavender*, 5 Moo. 270; R. & M. 229; post, "*Attorneys*." And where, by deed, an agent covenants "for himself, his heirs," &c., for the act of another, he is personally liable, although he describe himself as agent: *Appleton v. Bincks*, 5 East, 148. But the liability must clearly appear from the whole context of the instrument; therefore, where *A.*, an auctioneer, being employed to sell an estate of *B.*'s, signed an agreement with *C.* for the purchase, in his own name, as agent of *B.*, and *B.* himself shortly afterwards signed it, adding, "I hereby sanction this agreement, and approve of *A.*'s having signed it on my behalf," it was held that *A.* was not personally liable, as the agreement by *A.* and ratification by *B.* formed but one transaction, and showed that it was the understanding of all parties that *A.* should not be liable: 5 Moo. 270. Where the seller of goods, with the assent of the agent, chooses to give a distinct credit to such agent, knowing him to be such, the agent alone can be sued: *Paterson v. Gandatequi*, 15 East, 62; *Leggatt v. Reed*, 1 C. & P. 16. As to evidence in defence, post, 75.

*In an Action where the Principal was unknown.*] The plt. may show the def't's liability on a contract, by reason of his having entered into it without disclosing his principal, and though it be known that the agent acts in a representative character. Therefore, where an auctioneer does not disclose the name of his principal at the time of sale, he is liable for the non-completion of the contract: *Hanson v. Roberdeau*, *Peak. Rep.* 163; *Mitchison v. Hewson*, 7 *T. R.* 350; *M'Brain v. Fortune*, 3 *Camp.* 317; 15 *East*, 62; *Paley*, 293; 5 *Moore*, 270. And, where an agent residing in this country enters into a contract for another residing abroad, he will be personally liable; *De Gaillon v. L'Aigle*, 1 *B. & P.* 368; 15 *East*, 69. A master of a ship is generally liable for necessaries furnished abroad, *Cowp.* 639, *Westerdell v. Dale*, 7 *T. R.* 312; and in this country, unless they were furnished by the credit of the owner, either he or the owners may be sued, *Thompson v. Finden*, 4 *Carr. & Payne*, 159.

*In an Action where there was no responsible or apparent Principal*, the agent is liable. Thus, where the acting commissioners under a navigation act entered into an agreement with an engineer to complete a certain work, it was held that they were liable, though they had no funds: *Ambl.* 769, 772. So, where *A.* agreed with *B.* and *C.* to pave certain streets, and they, on behalf of the parish, agreed to pay, they were held liable: *Hard.* 205; 1 *Bro. C. C.* 101; *Paley*, 293. So, where commissioners, under an inclosure act, drew drafts on their bankers, it was held that they were personally responsible to the banker for the sums paid by them on such drafts: *Eaton v. Bell*, 5 *B. & A.* 35; *Burrell v. Jones*, 3 *B. & A.* 47. So, where parishioners at a vestry make an order, authorizing the churchwardens to repair a church, [\*74] the churchwardens are alone \*responsible: *Lanchester v. Trickler*, 1 *Bing.* 201; *Same v. Frewer*, 2 *Bing.* 361. Commissioners and churchwardens, or others, the agents, who employ or enter into a contract with another, or for whom an agent acts, are, in general, liable, when they have a power of reimbursing themselves at the time of the contract; and on this principle the cases in 1 *Bro. C. C.* 101, *Eaton v. Bell*, 5 *B. & A.* 34, and *Brooke v. Guest*, cited in 3 *Bing.* 481, were decided. And on the same principle, in *Higgins v. Longton*, there also cited, it was held, that commissioners of a turnpike were personally liable to persons employed about the construction and repairs of a road; and in *Brooke v. Guest*, a churchwarden was held personally liable to a person whom he had employed to draw plans of a church; and, as we have before seen, it is clear such agents are liable, if they personally contract; *ante*, 78. In *Sprot v. Powell*, 3 *Bing.* 478, it was held, that vestrymen, who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were not liable to the attorney employed by the surveyor; they having no power at that time to reimburse themselves, the surveyor should have been sued. But the agents of government, acting for the public, are not liable to be sued upon contracts made with them on behalf of government. So the governor of a colony has been held not to be liable: *M'Beath v. Haldimand*, 1 *T. R.* 172; *Unwin v. Wolsey*, *ib.* 674. And an action

does not lie against a public officer (as the secretary at war), by individuals, for sums which, as a public officer, he is authorized to pay them, although he may have received the money applicable to that purpose: *Gidley v. Lord Palmerston*, 3 B. & P. 275.

*In an Action where the Agent has exceeded his Authority, so that the Principal is not liable, or acted under an Authority which he knows the Principal has no right to give, he will be liable; as, where an agent sell property under a notice that it does not belong to his principal, and in which case the plt. should prove such notice: Cowp. 566; 4 Bur. 1984; B. N. P. 133; Fenn v. Harrison, 3 T. R. 757; Greenway v. Hurd, 4 ib. 553. The plt. should, in an action against an agent for exceeding his authority, be prepared to prove the agency. See "Principal and Agent."*

*In Action for Money had and received.] The proofs in this action will, for the most part, be found post, "Money Had and Received."* The plt. must, as a general rule, prove the receipt of the money, for the purpose of being paid over to the plt., and the def't.'s engagement so to pay it over: *Williams v. Everett*, 14 East, 590; 2 Roll. R. 441; *Firbank v. Bell*, 1 B. & A. 36; 1 Moore 74. Where the action is to recover money received by an agent for another, who has no right to it, plt. must prove the payment of the money, and the purpose for which it was paid; and he should also prove it has not been paid over, *Cox v. Prentice*, 3 M. & S. 344, *Cowp.* 565; or else that the receipt of the money was obviously illegal, or that the agent's authority was wholly void: *Townson v. Wilson*, 1 Camp. 396, 564; *Lovell v. Simpson*, 3 Esp. Rep. 153. As to stakeholders, *post*, "Money Had and Received."

*In Actions for Torts, an agent is considered liable for all torts and wilful trespasses, though done by the authority of his master, and in the assertion of his master's rights, 12 Mod. 448, 6 ib. 212, 2 ib. 242, 1 Wils. 328, 6 East, 450; trover lies against him, ib. Stevens v. Elwell, 4 M. & S. 261; post. The plt. should, therefore, prove that the tort was done wilfully; proof of a mere neglect or nonfeasance will not suffice: 1 Chit. Pl. 72. He need not adduce any proof as to the agency. And, where a coachman loses a parcel, the master is the proper person to be sued: 6 Moore, 47. An agent is never liable for the negligence of sub-agents, \*but recourse must be had against the prin- [\*75] cipal, or the person actually committing the injury: Stone v. Cartwright, 6 T. R. 411; Bush v. Steinman, 1 B. & P. 405; Bromley v. Coxwell, 2 ib. 438.*

#### *Evidence for Defendant.*

*In an Action against an Agent contracting on his own Account, he should endeavour to prove the contrary, and that he contracted in the capacity of an agent, which was known to the plt. at the time of the contract, and that the def't. had authority from his principal to make the*

contract: 12 *Ves.* 352; *Paterson v. Gandasequi*, 15 *East*, 62, 66; *Paley*, 246; 3 *P. Wms.* 277, 279.

*In an Action against an Agent because the Principal was unknown* at the time of making the contract, the deft. should endeavour to *disprove* the fact, either from reputation, or, which is preferable, from the plt.'s own knowledge.

*In an Action against an Agent for exceeding his Authority, so that the Principal was not liable, or for acting under an Authority which he knows the Principal had no right to give* deft. should be prepared to show the contrary, and prove the authority he had from his principal, or that the principal had such right.

*In Action for Money had and received.*] If the action be for not paying over money paid to the agent for the plt., deft. may show that the plt., by his conduct, did not consider the deft. as holding the money on plt.'s account; and that deft. appropriated the money properly to other purposes, before the plt. called on him for it: *Stewart v. Fry, Holt*, 372. In an action to recover money received by an agent for another, who had no right to it, he may prove in answer that he has paid it over to his principal: 1 *Str.* 480; *Cowp.* 69; 1 *Vern.* 136; *Greenway v. Hurd*, 4 *T. R.* 553. The payment, however, must be an actual payment; therefore, the mere passing of such money in account with his principal, or making a rest without any new credit given, fresh bills accepted, or a further sum advanced, is insufficient: *Cox v. Prentice*, 3 *M. & S.* 344; *Cowp.* 565; 1 *Moore*, 74; 1 *Str.* 480. See the case as to stakeholders, and when an agent is liable for money had and received, to be paid over to a third person: *post*, "*Money Had and Received.*"

*In Actions for Torts*, deft. should be prepared to show that the tort was done through mere negligence, and as the mere agent of another, and by his authority: he should strictly prove the agency.



## AGREEMENT.

See "ASSUMPSIT," "HANDWRITING," "SECONDARY EVIDENCE," "PAROL EVIDENCE," and the various titles of defences.



## ALIEN.

*How Defendant may avail himself of Defence of Plaintiff's being one.*] The deft. may avail himself of a defence of this nature under the general issue, if the plt. was an alien enemy at the time of the [76] plea \*pleaded: *Doug.* 749, n.; 6 *T. R.* 24; 13 *Ves.* 71. Yet, if the disability accrued by war after the contract was made, the

same should be pleaded specially, 3 *Camp.* 152-3-4, 15 *East*, 260, 8 *T. R.* 166, 6 *T. R.* 24, 1 *B. & P.* 222; and, if a neutral become an alien pending the suit, this should be pleaded in abatement, as it only suspends the action: 3 *Camp.* 152. This plea of alien enemy cannot be pleaded with any other plea, 12 *East*, 206, 1 *B. & P.* 222, *n.*; for which reason it may be advisable to plead it in abatement, when it can be so. As to the defence of husband or wife being an alien, *ante*, "*Abatement, Coverture.*"

*Form of Plea, &c.*] As this plea is not favoured in law, the greatest degree of certainty is requisite in framing it; and deft. must state that plt. not only was or is an alien, but that he came to England without letters of safe conduct from the king: 8 *T. R.* 167. To this plea the plt. may either deny the fact, or, if true, may reply a license, &c., to reside in this country: 43 *Geo.* 3, c. 155. See "*Pleas*," "*Replications.*"

*Precedents.*] Pleas of this nature are so rare, that it is not considered requisite to give the form of one. See a form of plea, 3 *Chit. Pl.* 910-1; of a replication of license, 1148; of plea in abatement, 1 *Went.* 7, 42, 51, *Lil. Ent.* 1.

*Evidence.*] The evidence must necessarily depend on the fact put in issue by the replication. If the plt. deny his being an alien, the proof of the negative lies on plt. If he deny he was an enemy, the deft. will be bound to prove he was, by proving the war between this country and that of which the plt. was a subject: *post*, "*War.*" If the plt. replies a license, he will be bound to prove it: *post*, "*Public Documents.*"



## ALTERATION OF CONTRACT.

*How Defendant may avail himself of.*] Deft. may avail himself of this defence in assumpsit or debt, on simple contract, under the general issue, *Hodgson v. E. Ind. Comp.*, 8 *T. R.* 280; and in debt on a deed, or in covenant, under the plea of *non est factum*: 5 *Co.* 23, 119; *B. N. P.* 172; 1 *Chit. Pl.* 425, 8.

### *Evidence for Defendant.*

*Effect of Alteration.*] If a contract, either by specialty or parol, be once entered into, any subsequent alteration thereof by a party interested, without the consent of the other party, in any material part, will render the contract wholly invalid *at common law*, as against the party not consenting to such alteration; and, in such case, he is not bound to perform the contract, even in its original terms, on account of the fraud attempted to be practised on him, and the jealousy of the law to prevent fraud: *Com. D. Fait. Cro. E.* 626; *Master v. Miller*, 4 *T. R.* 320;



*Sanderson v. Symonds*, 1 B. & B. 430; *Fairlie v. Christie*, 1 Moore, 114. And any material alteration made in a contract requiring a stamp, after it has been once perfected, and has become an available security, even with the consent of the parties, will require a fresh stamp; which if not added, will discharge the party, by operation of the Stamp Laws, *Bathe v. Taylor*, 15 East, 416; and, in the case of bills of exchange and promissory notes, such an alteration would render them absolutely void: *post*, "*Bills of Exchange*." But no alteration made in furtherance of the original object and meaning of the parties, and for the purpose of correcting an error, can render the instrument invalid, even as respects the Stamp Laws; *infra and post*, "*Stamp*."

\*Whether the alteration be by erasure or addition, and whether [\*77] the original writing be legible or not, is immaterial. The alteration of one or two parts of an agreement discharges the party liable thereon, if made without his concurrence. Thus, a material alteration in a sale note by the broker, after the bargain made at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidence by the instrument so altered by him: *Powell v. Divett*, 15 East, 29; *Whitcher v. Hall*, 5 B. & C. 269; 8 D. & R. 22. An alteration before execution of the contract cannot affect its validity: *infra*.

The alteration must be in a *material* part: for the alteration of a written instrument in an immaterial part, by the erasure or addition of a word not affecting the sense, does not discharge the party bound from responsibility, although such alteration was made without his consent, or against his will, by an interested person, *Sanderson v. Symonds*, 1 B. & B. 426; or by a stranger, *Waugh v. Russel*, 5 Taunt. 707. Where blanks were left in a mortgage-deed, in a part not affecting the mortgagee, and such blanks were filled up, and interlineations made in the same part of the deed after execution by the mortgagee, the alteration being in an immaterial part of the deed, it was held the deed was not avoided: *Doe d. Lewis v. Bingham*, 4 B. & A. 672; and see *Com. D. Fait. F. 1*; *Hall v. Chandless*, 4 Bing. 123. An alteration in a material part discharges the debt, even though the alteration is beneficial to him: *Semb. Whitcher v. Hall*, 5 B. & C. 269; 8 D. & R. 22. It seems the alteration, however, should be a substantial one: *ib.* With respect to what is a material alteration, it must necessarily depend on its nature, and the nature of the contract. Where, after the execution of a policy, the time of sailing was enlarged by the assured, and acquiesced in by all the underwriters except the debt, it was held this was a material alteration, and that the policy was void as to him: *Fairlie v. Christie*, 1 Moore, 114; *post*, "*Stamp*;" and see the various instances as to bills, *post*, "*Bills of Exchange*."

\*The alteration must, to discharge the party, be made by the plt., or a party interested, 4 T. R. 320, *Johnson v. D. of Marlboro.*, 2 Stark. 313, *Sanderson v. Symonds*, 1 B. & B. 430; when it would not be any discharge if made by accident, *Wilkinson v. Johnson*, 3 B. & C. 428, 5 D. & R. 433, *Palm*. 403, or by a stranger, provided the original terms of the instrument can be ascertained: *ib.*; *Raper v. Birkbeck*, 15

*East*, 17; 11 *Co. R.* 27, *a.*; *per Dallas, J.*, 1 *B. & B.* 430. Thus a deed, which had erasures in it and from which the seal was torn, was held good; it appearing that the seal was torn off by a boy: *Palm*, 403. So, where an umpire had altered his award after his authority was at an end, the court refused to set it aside, but confirmed it for the original sum awarded, which was still legible; saying, that the umpire was to be considered as a mere stranger, but that, if the alteration had been made by a party interested in the award, it would have been otherwise: *Henfrey v. Bromley*, 6 *East*, 309. And where, on a bond conditioned to pay £100 by six equal payments of £16. 13s. 4d. on the third of October in every year, until the full sum of *one pounds* was paid, a stranger inserted the word hundred between one and pounds, the sense being sufficiently manifest before the alteration, that the condition was for payment of £100, by six yearly instalments of £16. 13s. 4d., it was held, that the insertion of the word hundred did not alter the sense, and was therefore immaterial, and did not destroy the bond: *Waugh v. Bussell*, 5 *Taunt.* 707. Nor would such an alteration void the instrument, though made without the consent of the debt, and by an interested person: *Sanderson v. Symonds*, 1 *B. & B.* 426.

The alteration must, to discharge the party, be made *against his consent*: for, if it be made merely for the purpose or correcting a mistake, and in furtherance of the original intention of the parties, such alteration will not discharge either party, either at common law, or as regards the stamp laws: *Sanderson v. Symonds*, 1 *B. & B.* [\*78] 426; see instances, *Ch. B.* 102. A substantial alteration made in an instrument of guarantee, without the consent of the surety, even though the alteration is beneficial, will discharge such surety: 2 *Bro. C. C.* 579; 2 *Ves. J.* 542; 3 *Mer.* 272; *Heard v. Wadham*, 1 *East*, 619; *French v. Campbell*, 2 *H. B.* 163; 6 *T. R.* 200, *s. c.*; *Matson v. Booth*, 5 *M. & S.* 223; 5 *B. & C.* 269; 8 *D. & R.* 22. There can be little doubt that an alteration in a material point would avoid the contract, if made *without the consent* of the party to be bound; although such alteration rendered the instrument conformable with the original intention of the parties; for parol testimony of such meaning could not, in such case, be admissible in contradiction to the written contract, as it was originally worded by both parties: *Kershaw v. Cox*, 3 *Esp. Rep.* 246; *Cole v. Parkin*, 12 *East*, 471; *Bathe v. Taylor*, 15 *East*, 415. Where there are several parties to, and several interests in, a contract, an alteration by the consent of one of such parties, his interest only being thereby affected, will not discharge the others, though against their consent. Therefore, when a lease of lands was made by A. to B., at the request of C., D., and E., out of which B. was to grant underleases at the direction of D., E., and F. (the object of which underleases was to secure a ground-rent to A. and C.), and subject to such underleases, was to stand possessed of the lease in trust for D. and E., who were parties to the original lease: after C., D., and E. had executed that lease, and before A. or B. had executed it, the lease was altered, with the consent and privity of C. only, by an erasure which excluded a certain portion of land inserted by mistake, but in which D. and E. had no interest,

and A. and B. then executed the lease: it was held that this alteration did not render it invalid: *Hall v. Chandless*, 4 Bing. 123.

*Proof of Alteration.*] If the alteration appear upon the face of the instrument which the opposite party adduces in support of his case, inasmuch as such alteration gives the appearance of fraud, it imposes upon such party the proof of explaining away the same: *Singleton v. Butler*, 2 B. & P. 283; *Johnson v. D. of Marlboro.*, 2 Stark. 213. But it is at all times, if practicable, advisable for the other party to prove the alteration; and it is necessary to do so, if the alteration is not apparent on the face of the instrument, or it is doubtfully so. For this purpose, deft. should be prepared to prove the original contract from a copy, or otherwise, or by witnesses who can speak to the same. He should, if possible, prove the alteration itself, and that it was made by the plt., or for him, with his consent; and, if the erasure or alteration be so done as to be scarcely perceptible, it would be advisable to subpoena some party, such as an officer from the bank, who is accustomed to discover forgeries, &c., or alterations of this nature. If it be expected plt. will endeavour to prove deft.'s assent to the alteration, deft. should be prepared to rebut such evidence.

### *Evidence for Plaintiff.*

We have seen how far the burden of explaining away an alteration lies on the plt., *supra*; also as to how far an alteration avoids a contract. The plt. should be prepared to show that the erasure was made at the time of the contract being entered into, by means of the subscribing witness, or otherwise. If it was made afterwards, for the purpose of furthering the original intent of the parties, the plt. should be prepared to prove that fact: *ante*, 77. In some cases, indeed, the instrument itself would show such intent: 5 Taunt. 707, *ante*, 77. If the erasure was made by the subsequent assent of the deft., such subsequent assent should be proved: see "*Admissions*," "*Written Evidence*," *post*, "*Bills of Exchange*."



[\*79]

### AMBIGUITY.

See "PAROL EVIDENCE."



### ANCIENT DEEDS, &c.

See "DEEDS."

## ANCIENT WINDOWS.

See "NUISANCE."

*Form of Remedy*, 79.*Form of Pleadings*, *ib.**Precedents in*, 80.*Declaration for obstructing an Ancient Window*, *ib.*  
*for continuing the Obstruction*, 81.*Evidence for Plaintiff*, *ib.**in general*, *ib.**Plaintiff's Interest in Premises*, *ib.**Situation of Premises*, *ib.**Right to the Windows*, *ib.**Defendant caused the Injury*, 82.*The Injury*, *ib.**Damages*, 83.*Evidence for Defendant*, *ib.**against Plaintiff's Right*, *ib.*

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*Form of Remedy.*

The form of remedy for the obstruction of light or air through ancient windows, by any erection not on the plt.'s land, whether in the name of tenant in possession or the reversioner, is by an action on the case. The form is the same, though the plt. claim by grant; 1 *Price*, 38. When an injunction will be granted, see 2 *Swans*. 333. The only remedy a party has against another, for opening a new window, or enlarging or raising an ancient one, so as to disturb plt.'s privacy, or otherwise annoy him, is to place some erection on the plaintiff's land, opposite to the offensive window, or part newly enlarged or raised, taking care to commit no trespass, *Chandler v. Thompson*, 3 *Camp*. 80; *Weld v. Hornby*, 7 *East*, 195; such party cannot bring an action, *ib.* There is no remedy for the mere obstruction of a prospect: 9 *R.* 58; *Riviere v. Bower*, 1 *R. & M.* 25; *Back v. Stacey*, 2 *C. & P.* 466. A party cannot obstruct an ancient light, because it is against the provisions of the Building Act, 14 *G. 3*, c. 78; *Titterton v. Conyers*, 1 *Mars*. 140.

*Form of Pleadings.*

*Declaration.*] The venue must be local: 1 *Taunt.* 379. It is sufficient in actions of this nature for plaintiff to declare on his possession of the house, as in the following precedent, and it need not be stated plt. was lawfully possessed: 1 *East*, 244, 212; *Dowland v. Slade*, 5 *East*, 276. And it is \*improper to set out his title, or [\*80] allege prescription, &c. as it is merely matter of evidence, and the form is the same, whether the plt. claim by prescription or grant: 1 *Price*, 38. This subject is fully explained in 2 *Saund.* 113, a. (1.) to

114, b. Stating an insufficient title is demurrable: 2 *Ld. Raym.* 228; 1 *Salk.* 365. In declaring of the suit of a reversioner, his interest must be described accordingly, though it is sufficient to allege generally that the premises were in the possession of a third person, as plt.'s tenant; in thus stating the title, see *post*, "Nuisance." The local situation of the premises need not be described, and, if stated, a variance in it would be fatal; it is not necessary to state, as in some precedents, that the windows were "ancient:" *Com. D. Action sur le case, E.* 1; 2 *Saund.* 113, b. 114; 1 *Price*, 27. The precise day, in stating the obstruction, is immaterial: *Cro. El.* 191. The statement of the injury need not be with local certainty, and it is sufficient, if it be laid at any place within the body of the county: *Mersey Navig. Com. v. Douglas*, 2 *East*, 502; *Jefferies v. Duncombe*, 11 *tb.* 226. The mode of obstruction, if stated, should be according to the fact; but there is no occasion to state such mode, and it will suffice to declare as in the following precedent: 3 *Leon.* 13, *Cro. J.* 606; 1 *B. & P.* 180; 1 *Ld. Raym.* 452; *Willes*, 577; There is no occasion for alleging that the obstruction raised was on a new foundation; though in London a person may build upon an ancient foundation, against the lights of another: *Yelv.* 215; 1 *Rol.* 558; 1 *Bur.* 248; 2 *Swans.* 333. As the filing the bill in K. B. is the commencement of the suit, it is always correct, in that court, to state the obstruction still continues: *Swancot v. Westgarth*, 4 *East*, 76; *Best v. Wilding*, 7 *T. R.* 4. But, in 2 *Chit. Pl.* 770, it is said that in C. P. "it seems more correct here to insert a particular day." It is not necessary to state the commencement of a nuisance, where the plt. proceeds for its continuance, for it is said that, "as the action of the case declareth the whole matter, it is not material when the nuisance was erected:" *Cro. E.* 191; see also 1 *Ld. Raym.* 370; 1 *Salk.* 10; *Carth.* 455; *vide*, "Case." Where the party proceeds for a continuance of a nuisance against the fee or lessee of the original obstructor, it has been considered necessary to state a previous request or notice to remove such nuisance: *Willes*, 583; *Cro. J.* 555; 5 *Co.* 100-1; *Jenk.* 260. But, on a question as to the necessity of proving such request, Abbot, C. J., observed, "that a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all restrictions imposed upon his predecessors;" therefore, where such predecessor was not entitled to notice, it can hardly be necessary to allege it: *Salmon v. Bensley*, 1 *R. & M.* 189.

*Plea, &c.*] The plea will be the general issue. Under this plea it has been held deft. may show a custom of London to build on an ancient foundation to any height, *Com. Rep.* 273, 1 *Wils.* 45, 175, 2 *Mod.* 274; or he may give in evidence plt.'s license, or any other fact which can show deft. had a right to obstruct the light, &c.: *Winter v. Brockwell*, 8 *East*, 308; 2 *Mod.* 6; *Com. Rep.* 273, n.; 5 *B. & C.* 221.

*Precedents.*

## DECLARATION IN CASE, FOR OBSTRUCTING AN ANCIENT WINDOW.

For that whereas the said plt., long before, and at the time of the committing of the grievances hereafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and premises, with the appurtenances, situate, and being at, (*local situation, but if any doubt as to it, omit the same, and state the house to be situate merely*) in the county of B., in which said messuage and premises, with the appurtenances, during all the time aforesaid, there were, and still of right ought to be, divers, to wit, six windows, through which the light and "air, during all the time aforesaid, ought to have entered, and still of right ought to enter, into the said messuage and premises, with the appurtenances, for the convenient and wholesome use, occupation, and enjoyment thereof, and of which said premises the said deft. hath always had notice, to wit, at, &c., in the county aforesaid. Yet, the said deft., well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said plt., and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said messuage and premises, with the appurtenances, heretofore, to wit, on, &c. (*any day about the time*), and on divers other days and times aforesaid, and before the commencement of this suit, to wit, at, &c. aforesaid, wrongfully and injuriously\* greatly darkened the said windows, and hindered and prevented the light and air from coming and entering unto, into, and through the said windows, into the said messuage and premises, with the appurtenances, and the same have thereby been rendered and are uncomfortable, unwholesome, and unfit for habitation, and the said plt. hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage and premises, with the appurtenances. [*If any special damage, state it.*] [\*81]

## SECOND COUNT FOR CONTINUING THE OBSTRUCTION.

[*Second count same as the first, to the asterisk, and then state as follows:*] kept and continued, and caused to be kept and continued, the said windows greatly darkened, and hindered and prevented the light and air from coming and entering into and through the same, into the said messuage and premises, for a long space of time, to wit, hitherto. By means, &c. (*Conclude as in the first count.*)

*Plea, see forms, post, "Case."*

*Evidence for Plaintiff.*

*In General.*] Every man on his own land has a right to all the light and air which will come to him; and, if he erect on such land buildings with windows, looking towards the adjacent premises, and the owner thereof suffer the light and air to pass to those windows, without interruption, for twenty years, (within which period they may be obstructed), he may then prescribe for them as ancient windows, and claim to have them free from obstruction: *Moore v. Rawson*, 3 B. & C. 332; *Cross v. Lewis*, 2 B. & B. 689; 4 D. & R. 234; 2 *Saund.* 175, b.; *Gray v. Bond*, 2 B. & B. 667.

*Plaintiff's Interest in Premises.*] If the action be at the suit of the occupier, the plt. must prove his actual occupation, possession, in fact, being quite sufficient to sustain the action: 1 *East*, 212; *Grimstead v. Martowe*, 4 T. R. 719; 1 *Show*, 7, a. Proof of occupation by a mere servant for plt. would suffice: 16 *East*, 33; *Litt. R.* 139; 4 B. & C. 574. If the action be at the suit of the immediate reversioner, or party entitled to the remainder in fee or in tail, or for a less estate (and who may sue if the obstruction be such as to injure the reversion, &c., 4 *Burr.* 2141, 1 *Saund.* 322, 2 *ib.* 252, b., 3 *Lev.* 209, *Com. D. Ac-*

tion on Case for Nuisance, B.), he should prove his interest accordingly, either by his tenant or otherwise. See *post*, "Reversioner," "Ejectment."

*Situation of Premises.*] This should be proved as stated in the declaration, as a variance would be fatal. It makes no difference whether the building in which the windows are obstructed, be proved as situated at the extremity of the land or not: *Cross v. Lewis*, 2 B. & C. 686, 4 D. & R. 234, s. c.

*The Right to the Windows.*] Plt. should prove either that [\*82] \*his house, with windows looking into the adjoining premises, have been so standing for twenty years, and that during that time the use of such windows has been uninterruptedly enjoyed, *Moore v. Rawson*, 3 B. & C. 332, *Cross v. Lewis*, 2 *ib.* 689, *Bealey v. Shaw*, 6 East, 208 (and which may be done by calling prior occupiers and witnesses, who can speak to the fact); or else he should prove a grant or presumption of a grant from the deft., or from a person under whom deft. claims: such as proof that a party having land, built on it a house with lights, and afterwards sold the remainder of the land, the plt. and deft. both claiming under the original owner: 1 Lev. 122. Proof that plt. and deft. held under the same landlord (either in the cases of an adjoining house or where a house has been divided), and that the windows obstructed existed at the time of the demise, has been held sufficient, without proving twenty years' prescription for the windows, or that the house is not of recent construction, *Riviere v. Bower*, 1 R. & M. 25; and proof of the plt. being occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, is sufficient in an action against the tenant of the other for an obstruction of the plt.'s lights by adding to his own building, however short plt.'s previous period of enjoyment of the lights may be proved to be: 1 Price, 27. If the action be against the immediate reversioner, &c., who has not been in the possession of the premises, plt. should, if possible, show that his windows have remained undisturbed with the acquiescence and consent of the deft. himself; inasmuch as a landlord or immediate reversioner cannot, without notice, be prejudiced by the laches or acquiescence of the tenant, in that which is a prejudice to the inheritance: *Daniel v. North*, 11 East, 372; *Wood v. Veal*, 5 B. & A. 454; *Barker v. Richardson*, 4 B. & A. 579; *ante*, "Admissions." If the plt. has discontinued the enjoyment of his light during the twenty years, he should prove that, at the time and during such discontinuance, he did some act to show an intention of resuming the enjoyment within a reasonable time: *Moore v. Rawson*, 3 B. & C. 332, 579. The position of the plt.'s house may frequently assist the jury in forming an opinion as to the fact whether the light is or is not obstructed, *Cross v. Lewis*, 2 B. & C. 688, 4 D. & R. 234, and for this purpose it should be proved: *post*, 83. If the plt. has licensed the defendant to obstruct the windows, without any consideration for such license, he should prove a countermand of such license, and a tender of the expenses incurred by deft. in consequence of such license;

*Winter v. Brockwell*, 8 East, 308; *Taylor v. Waters*, 7 Taunt. 374; *Hewlings v. Shippam*, 5 B. & C. 232.

*Deft. caused the Injury.*] This is established either by proving his actual erection of the nuisance by himself or servants, or that he is the occupier of the premises whereon the obstruction is placed: 4 T. R. 318, 2 H. B. 350. Proof that deft. superintended the erection of the obstruction, and that he particularly directed the workmen, will be sufficient, though he was a mere clerk: 6 Moore, 47. Where the action is for continuing the nuisance, such continuance, as well as the original obstruction, must be clearly proved. When deft. erects the nuisance and demises, proof of this will render him liable: 2 Salk. 460. If notice has been given to the person who immediately preceded deft., it will not be necessary to prove one was given to the deft., "as a person who takes premises on which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessor, by the receipt of such notice:" per Abbot, C. J., *Salmon v. Bensley*, 1 R. & M. 189. But it seems safest, where the action is not against the original erector, to prove a service of notice to discontinue the injury: *Will.* 583; *Cro. J.* 555; 5 Co. 100; *ante*.

*The Injury.*] The injury should be proved as described in the declaration, as a variance would be fatal. It is not necessary, however, to "prove all the means of obstruction as stated. In [\*83] an action against a reversioner, it should seem that plt. must prove the obstruction was of a permanent nature, or else the damage so material as necessarily to affect his reversionary interest: see *Jackson v. Peshed*, 1 M. & S. 234; *Attersol v. Stevens*, 1 Taunt. 202. It is not necessary to prove a total obstruction of light or air: *Cotterell v. Griffiths*, 4 Esp. Rep. 69; 2 Selw. 1046. And, according to Lord Kenyon's doctrine, *ib.*, "any thing which tended to deprive a person of the enjoyment of the light and air in the same quantity to which his house was entitled as an ancient messuage, entitles plt. to an action;" but, according to Best's, C. J., judgment, in *Back v. Stacey*, 2 C. & P. 465, "it is not sufficient to constitute an illegal obstruction, that the plt. has in fact less light than before, nor that his warehouse, the part of his house principally affected, was not used for all the purposes to which it might have been applied. In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plt. from carrying on his accustomed business on the premises as beneficially as he had formerly done. His lordship added, "it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plt. in the enjoyment of the premises." The plt. should use great care in getting up his evidence, and come well prepared with surveyors and plans, and every other means within his power of enabling the jury to form a correct decision; and it is in general advisable, when it can be conveniently done, that the jury should view the premises: *Back v. Stacey*, 2 C. & P. 466; see 2 B. & C. 688.



*Damages.*] Some substantial injury should be proved, but, however slight, it would be sufficient to entitle plt. to damages, though nominal: *Cotterell v. Griffiths*, 4 *Esp. Rep.* 69, 2 *C. & P.* 465; *supra*. In measuring the injury, plt. may show, by reason of his particular trade, he has been injured by his being deprived of a display of goods, &c. or another like fact; *Reviere v. Bower*, 1 *R. & M.* 25, 2 *C. & P.* 465. Plt. may, if stated in the declaration, show he has expended money in obtaining other light or the like. See "*Case*."

### *Evidence for Defendant.*

*Against Plaintiff's Right.*] Inasmuch as twenty years' uninterrupted possession does not confer a legal right, but only raises a presumption of such right, deft. may rebut it by showing it does not exist, and that the possession has been interrupted: *Cross v. Lewis*, 2 *B. & C.* 689, 4 *D. & R.* 234, *s. c.* Proof that the window has been blocked up above twenty years, *Lawrence v. Obee*, 3 *Camp.* 514; or that plt. by some other means, discontinued the right of enjoyment: as by building up the window, pulling it down, or the like; for the right to light is acquired by enjoyment, and may be lost by a discontinuance of it, unless the party who ceases to enjoy, at the same time, does some act to show an intention of resuming the enjoyment within a reasonable time: *Moore v. Rawson*, 3 *B. & C.* 332; *Cross v. Lewis*, 2 *ib.* 689. The presumption of a right from twenty years' undisturbed enjoyment of light, is excluded by evidence of the custom of London: 2 *Swans.* 333, 1 *Co. R.* 273. The deft. may also rebut the evidence of the plt.'s prescription, by showing that, though plt. has had windows for twenty years, that within that period the land was glebe, and that, therefore, the rector, who was tenant for life, could not grant a sufficient license on which the prescription might attach, *Baker v. Richardson*, 3 *B. & A.* 579; or that the previous occupier within such period was merely his tenant, and he entitled to the immediate reversion, &c., as such act, being merely that of the tenant, could not exclude deft., *Daniel v. North*, 11 *East*, 372, *ante*, 82; or deft. may show that his obstruction [\*84] was made in consequence of a license from plt. himself, \*or one from whom he claims, which will be a sufficient answer, though the license may have been revoked after the obstruction was made, unless, indeed, the deft.'s expenses have been tendered or paid: *Winter v. Brockwell*, 8 *East*, 308; *ante*, 82. Deft. may show a custom of London to build on an ancient foundation to any height: 1 *Co. R.* 273; 1 *Wils.* 45, 175. The mere circumstance of the windows being in a party wall, contrary to the 14 *G.* 3, c. 78, is no answer to an action for obstructing them: *Titterton v. Conyers*, 1 *Marsh*, 140.



### ANIMALS.

See "*NUISANCE*."

## ANNUITY, ACTION FOR.

*Form of Remedy.*

THE form of remedy for the arrears of an annuity granted by deed, is debt, *Rudder v. Price*, 1 *H. Bla.* 554, 2 *Saund.* 303, n. d., *Owen*, 42, *Bac. Ab. Debt*, A. C.; or covenant, 1 *Chit. Pl.* 105-6. But debt is the preferable remedy, as the judgment is final in the first instance. It is also more advisable to sue in debt on the covenant in the annuity-deed, than on the bond, because damages in the latter case must be assessed in pursuance of 8 & 9 *Wm.* 3, c. 11, s. 8. Where the grantor has become a bankrupt or an insolvent debtor, the grantee should proceed for arrears which become due after the insolvency, by action of covenant on the annuity-deed, and not by action of debt on the bond, to which the bankruptcy and certificate would frequently be a bar: *Cullen*, 92-4, 392; *Cotterel v. Hooke*, *Doug.* 97. No action is sustainable at law unless the annuity be granted by deed, and there must be an express grant in such deed: 2 *D. & R.* 603; 14 *Ves.* 491. And debt is not sustainable for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout so long as the estate of freehold continues: *Webb v. Jiggs*, 4 *M. & S.* 113, 2 *Saund.* 304, n. 8. And this, although it is not stated in the declaration that the grantor had a freehold in the premises, out of which it was payable, as it must be inferred he had such an interest, till nothing appears to the contrary: *Kelly v. Clubbe*, 6 *Moore*, 335, 3 *B. & B.* 130, s. c. If the annuity-deed be void, the plt. may proceed for the consideration-money, or on the original contract, if valid: *Pollard v. Scholey*, *Cro. El.* 20; *Scurfield v. Gowland*, 6 *East*, 241; *Shove v. Webb*, 1 *T. R.* 732; *post*, "*Money Had and Received*."

*Form of Pleadings.*

*Declaration.*] There is nothing peculiar relating to the form of the declaration, the rules as to which are similar to those in other actions in debt or covenant on deeds or bonds. See "*Debt*," "*Covenant*."

*Plea.*] The rules relative to pleas in actions on specialties here prevail: see "*Debt*"—"Covenant." The usual pleas are, that no memorial of the annuity or names of witnesses have been enrolled, in pursuance of the 53 *G.* 3, c. 141; or payment before or after the days specified, or usury, &c.

If no memorial be pleaded, and the consideration of the annuity \*does not appear on the previous pleadings, it must be alleged in the plea that the consideration was pecuniary: *Horn v. Horn*, 7 *East*, 529. A plea stating a defective memorial, should show that there was no other enrolled: *Simmons v. Hunt*, 1 *Marsh.* 155; *Askew v. Makreth*, 1 *N. R.* 214. The objection either to the deed or the memorial must be pointed out in the plea, and care taken that no

subsequent departure in the rejoinder be made; where, to an action of debt on a bond given to secure an annuity, the deft. pleaded no such memorial was enrolled as required by the statute, and the replication stated that a memorial was enrolled containing the particulars which the statute directs, and the rejoinder alleged that the memorial in the replication mentioned did not truly set forth the consideration on which the annuity was granted, it was held that this was a departure from the plea: *Praed v. Duchess of Cumberland*, 4 T. R. 585; *Duchess of Cumberland v. Praed*, 2 H. Bla. 280; *sed vide Fisher v. Pimbley*, 11 East, 188.

*Replication.*] See the replications and rules relating to, in "*Debt*," "*Covenant*," &c. The usual replication to a plea, that no memorial was enrolled according to the act, is setting out the memorial *verbatim*, and stating it was duly enrolled. Such replication usually concludes with a verification by the record, but this seems unnecessary.

### Precedents.

#### DECLARATION IN DEBT ON AN ANNUITY-DEED, FOR ARREARS OF ANNUITY.

(Commencement in debt as usual, see "*Debt*.") For that whereas, heretofore, to wit, on, &c., at, &c., by a certain indenture then and there made between the said plt. of the one part, and the said deft. of the other part (which said indenture, sealed with the seal of the said deft., the said plt. now brings into court, the date whereof is the day and year aforesaid), he, the said deft., for the consideration therein mentioned, did grant, &c. (Here state, in the past tense, the grant of the annuity and the defendant's covenant to pay it, and proceed as follows :) by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. Nevertheless, the said plt. in fact saith, that after the making of the said indenture, and during the natural life of the said E. F., to wit, on, &c., at, &c., aforesaid, a large sum of money, to wit, the sum of £—, of lawful, &c., of the said annuity or yearly rent-charge, for one year and a quarter of a year, which expired on the day and year last aforesaid, then elapsed, became and was due and owing from the said deft. to the said plt., and still is in arrear and unpaid, contrary to the form and effect of the said indenture and of the said covenant of the said deft. so by him in that behalf made as aforesaid, to wit, at, &c., aforesaid, whereby an action hath accrued to the said plt., to demand and have of and from the said deft. the said sum of £—, being the said sum above demanded. Yet, &c. (Conclusion as usual: see "*Debt*.")

See form of declaration in debt on the bond, stating condition and breach, 2 Chit. Pl. 442; in covenant, *Readshaw v. Balders*, 4 Taunt. 57, 3 Went. 318, *Hope v. Colman*, 1 Wils. 211; by surviving partners, *Leycester v. Lockwood*, 1 M. & S. 527; by executrix, 6 Went. 527; by devisee, *Duppa v. Mayo*, 1 Saund. 276; by husband, 2 Mod. Ent. 244, 6 Went. 457; by husband and wife against husband and wife, *Lil. Ent. 177*. Forms of declaration in assumption against deft. on guarantee of payment of, *Sandilands v. Marsh*, 2 B. & A. 673, 2 Went. 211; to allow plt. an annuity in consideration of past cohabitation, *Gibson v. Dickie*, 3 M. & S. 463, *Binnington v. Wallace*, 4 B. & A. 650; against executor on parol agreement of testator to bequeath plt. annuity, *Fenton v. Emblers*, 3 Burr. 1278.

#### PLEA TO DEBT ON ANNUITY-BOND, THAT NO MEMORIAL WAS ENROLLED UNDER 53 G. 3 c. 141.

[\*86] "(First non est factum after craving oyer of the bond and condition, as post, "*Bond*;" and, for a further plea of *onerari non*, as usual, post, "*Debt*.") Because he says, that no memorial of the said writing, in the said declaration mentioned, was enrolled in the High Court of Chancery within thirty days after the execution thereof, according to the directions of a certain act of Parliament, made and passed in the fifty-third year of the reign of his late majesty, King George the Third, (or if there was a defective memorial, then say, that no such memorial of the said writing in the said declaration mentioned, as was and is required by a certain act, &c., made, &c., was enrolled, &c.); whereby the said

writing obligatory, in the said declaration mentioned, was and is null and void. And this, &c. (*Conclude with a verification and onerari non, as usual: see "Debt."*)

PLEA OF PAYMENT AFTER THE DEATH.

And for a further plea, &c. (*Actio non, as usual: see "Debt."*) Because he says that he, the said deft., after the making of the said writing obligatory, and before the exhibiting the bill of the said plt. in this behalf (or if in C. P. or by original, before the commencement of this suit), to wit, on, &c., at, &c., aforesaid, paid to the said E. F. all and every the sums of money which had at any time before then become due and owing upon or by virtue of the said writing obligatory and the said condition thereof, after each of the said several respective sums of money became and were due and owing under and by virtue of the said writing obligatory and the condition thereof. And this, &c. (*Conclude with a verification, as usual: see "Debt."*)

See form of plea of no memorial of names of witnesses, 3 *Chit. Pl.* 975, payment *ad diem*, &c.; that in the assurances the consideration-money is stated to have been paid by the grantee, but that it is not stated that the sum was advanced by an agent of the grantee, *Horwood v. Underhill*, 3 M. & S. 82. See form of plea to action on deed for payment of annuity on demand, no demand: 1 *Wils.* 221.

*Replication.*] See form of stating a memorial, 3 *Chit. Pl.* 1175.

*Rejoinder.*] See form of, that the consideration is untruly alleged by the memorial to be paid to both the obligors: *Praed v. Duchess of Cumberland*, 4 T. R. 588.

*Evidence for Plaintiff.*

The evidence must, like other cases in action on specialties, depend on the plea pleaded.

*On non est factum.*] Plt. must be prepared to prove the execution of the deed as usual, see "*Deed*," and what is in arrear. There does not seem any actual necessity for proving that the grantor or person on whose life the annuity is granted, is living (deft. not having denied it by pleading), though usual so to do. If, indeed, the action is on the bond, and breaches are suggested in pursuance of the 8 & 9 W. 3, then such proof would be necessary.

*No Memorial, &c.*] The presumption is, that the annuity-deed is valid, and has been duly memorialized; it is not, therefore, incumbent on the plt. to prove the due enrolment of the memorial, unless, indeed, deft. plead no memorial, &c., when plt. should be prepared to support his replication by showing the enrolment within the proper time: *Doe d. Griffin v. Mason*, 3 *Camp.* 7. If deft. does not, in his rejoinder, deny the record of the enrolment, an examined copy of the enrolment, completely recorded, should be produced and proved: see *post*, "*Record*." The date \*of the enrolment, endorsed by the clerk [\*87] of the enrolment, is, it seems, conclusive evidence of the date: *Rex v. Happer*, 3 *Price*, 495.

*Other Issues.*] Plt. should be prepared to support his replication. If the burden of proof lies on deft., plt. should be prepared to disprove the subject of such proof.

*Damages.*] Plt. should be prepared to prove the amount of the arrears due.

*In Action to recover money had and received, if annuity-deed be defective, post, "Money Had and Received."*

*Evidence for Defendant.*

This must depend on the plea or rejoinder, which deft. must be prepared to support: *post*, "*Payment*," "*Usury*." An annuity transaction is not in general affected by the usury laws, unless it be very colourable: "*Usury*." If deft. plead a defective memorial, he should be prepared to point out and prove the defect: *Doe d. Griffin v. Mason*, 3 *Campb.* 7.



## ANSWER IN CHANCERY.

See "*CHANCERY*."



## APOTHECARY AND SURGEON, ACTIONS BY AND AGAINST.

### ACTIONS BY, FOR THEIR BILL.

*Form of Remedy and Pleadings*, 87.

*Precedents*, *ib.*

*Indebitatus for Work, &c., as Apothecary*, *ib.*

*Evidence for Plaintiff*, 88 to 90.

*Evidence for Defendant*, 90, 91.



### *Form of Remedy and Pleadings.*

THE form of remedy by an apothecary or surgeon, for his bill for medicines and attendance, is by action of *assumpsit* or debt: see "*Assumpsit*," "*Work and Labour*." There is nothing peculiar relating to the form of the declaration. The plt. may, in general, recover under the common *indebitatus* count for work and labour, and materials, *post*, "*Work and Labour*;" but it is usual to insert a special *indebitatus* count, disclosing the nature of the work done. In such count, if the action be for the cure of a loathsome disease, the name of such disease should not be mentioned: *anon.* 2 *Wils.* 20; see further, *post*, "*Work and Labour*."



### *Precedents.*

COUNT FOR WORK AND LABOUR AS AN APOTHECARY OR SURGEON, AND FOR MEDICINES.

The Commencement of the count is as *post*, "*Assumpsit*," "*Debt*," inserting the words, "for the work and labour, care, diligence, journeys, and attendances of the said plt., by him, the

said plt., before that time done, performed, given, and bestowed, as a surgeon and apothecary of the said deft., at his special instance, &c., in and about the healing and curing and relieving of the said deft. [and divers other persons] of divers sicknesses, diseases, disorders, and maladies, under which they had before then respectively laboured and languished, and in and about the endeavouring to heal and cure the said deft. [and divers other persons] of divers other diseases, sicknesses, disorders, and maladies, under which he [or they] had before then [respectively] laboured and languished, and for divers medicines and other necessary things before that time found and provided, administered, delivered, and applied by the said plt. on those occasions, for the said deft., and at his like special instance and request, and being so indebted, &c. (*Conclusion as post, "Assumpsit."* "Debt." *The quantum meruit thereon is as post, "Assumpsit," inserting as follows:*) had, before that time, done, performed, given, and bestowed other his work and labour, care, diligence, journeys, and attendances as a surgeon and apothecary, in and about the healing and curing and relieving of the said deft. [and divers other persons] of divers other diseases, sicknesses, disorders, and maladies, under which he [said they] had before then [respectively] laboured and languished, and also in and about the endeavouring, &c., and had also at the like, &c., before that time found and provided, administered, delivered, and applied, divers other medicines and necessary things on those last mentioned occasions for the said deft., he, the said deft., undertook, &c. (*Conclusion as post, "Assumpsit;" add counts for work and labour and journeys, for goods sold, money paid, and the account stated.*)

See form in 2 Chit. Pl. 84, for inoculating a child, and *ib.* 84, and for acting as a manmid-wife.

### *Evidence for Plaintiff.*

The plt. must, in this action, prove his retainer; his being a regular apothecary or surgeon; the work done, and medicines supplied; and the reasonableness of the charges.

*Proof of Retainer.*] The plt. must prove his retainer, as in other actions for work and labour, &c.: *post*, "*Work and Labour.*" If the retainer was in writing, the same should be produced and proved, *post*, "*Handwriting*," "*Secondary Evidence*;" if by parol, then it should be proved by witnesses present when given. If deft. has made any admissions of his liability, the same should be proved: see "*Admissions.*" In general, where the plt.'s claim is to recover the expenses of attending, &c., a pauper, it should be observed, that such action should be brought against the overseer of the parish where the accident, or other thing occasioning the illness, happened, *Tomlinson v. Bentall*, 5 B. & C. 738, *Gent v. Tomkins*, cited *ib.* 745, *Lamb v. Bunce*, 4 M. & S. 275; provided the plt. can prove that the overseer or deft. authorized the plt.'s employment, &c., by an express promise, or by an implied one, as by standing by, and seeing him perform his operations, &c., without any objection, or the like. Where a pauper, being casually in the parish of A., met with an accident which disabled her, and which required immediate medical assistance, the constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her, it was held, that it was the duty of the parish officers of A. to have taken the pauper to the nearest convenient house in A., and to have provided medical attendance there; and that they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them; and that they were therefore liable to pay the

plt. a surgeon's bill: *Tomlinson v. Bennett*, 5 B. & C. 738. Where an action was brought, not against the overseers of the parish in which the accident happened, but against the overseer of the parish to which the pauper belonged, the court intimated a very strong opinion, that it was not properly brought against the overseer of the latter parish: [\*89] *Gent v. Tomkins*, cited \*5 ib. 745. In some cases, the overseer of the parish to which the pauper is removed will be liable: as, where a pauper had his leg accidentally fractured in one parish, and was conveyed to the next house in an adjoining parish, and was confined there, and visited by the overseer, and attended by the plt., a surgeon, who attended the parish poor, with the knowledge of the overseer, it was held, such overseer was liable for the plt.'s expenses in the cure: for the overseer's knowing of, and not repudiating the plt.'s attendance, was equivalent to a request: *Lamb v. Bunce*, 4 M. & S. 275. A pauper residing in one parish received during illness a weekly allowance from another parish, where he was settled; and it was held, that an apothecary, who had attended the pauper, might maintain an action for the amount of his bill against the overseer of the latter parish, who had expressly promised to pay: *Wing v. Mill*, 1 B. & A. 104.

*Proof of Plaintiff being an Apothecary, &c.*] By 55 G. 3, c. 194, s. 21, explained and amended by 6 G. 4, c. 133, s. 5, it is enacted, that "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he was *in practice prior to or on the 1st of August*, or that he has obtained a "*certificate*," &c., to practise as such from the Apothecaries' Company, in the manner pointed out by the act, and by the 6 G. 4, c. 133, s. 5. The apothecary must prove that he was in practice on the 1st August, 1815, *Apothecaries' Company v. Roby*, 5 B. & A. 949, or else that he had obtained a certificate. The act does not affect physicians, chemists, or druggists, or the privileges vested in the College of Surgeons: sec. 28, 29. The plt. failing to bring himself within the above act, cannot recover even for the vials in which the medicines were contained: *Steed v. Henley*, 1 C. & P. 574.

If the plt. relies on showing he was *in practice*, he must prove it strictly. Evidence of merely having administered medicines on many occasions to different patients, previous to and on the 1st of August, 1815, will not be sufficient evidence; but he must show that he exercised the duties of an apothecary under the 5th section of the prior act; as, in making up the prescriptions of physicians, &c.: *Apothecaries' Company v. Warburton*, 3 B. & A. 40. Nor will it be sufficient if plt. prove that he attended as an apothecary, while he was an assistant in the house of another apothecary, though the patients paid the plt., and not the person he was assistant to: *Brown v. Robinson*, 1 C. & P. 264.

If the plt. relies on his *certificate*, the same must be proved. By 6 G. 4, c. 133, s. 7, it is expressly declared, that the common seal of the Apothecaries' Company is sufficient proof that the person named therein is qualified to practise. But plt. must prove that the seal affixed is the genuine seal of the company, as the act does not make the seal prove itself: *Chadwick v. Bunning*, R. & M. 397; 2 C. & P. 106, s. c. It

is sufficient for the plt. to prove the certificate, without proving an apprenticeship served; *Sherwin v. Smith*, 1 Bing. 204. Where a promissory note has been given, which is expressed to be in "consideration" of his care and medical attendance bestowed on the "maker," plt. must prove his certificate, or that he is within the exception contained in the 55 G. 3: *Blogg v. Pinkers, R. & M.* 125. A general certificate of qualification to practise, without limitation as to time or place, is sufficient, under 55 G. 3, c. 194, to enable him to sue on a bill for medicines, &c., though they are furnished to patients in London; although he has only paid £4. 4s., the price of the country certificate, under such act: *Chadwick v. Bunning, R. & M.* 306-7; 2 C. & P. 106, s. c. In an action for the penalty under the act, it is for the deft. to prove the affirmative, that he has his certificate: *Apothecaries' Company v. Bentley, R. & M.* 159.

*Proof of Plaintiff being a Surgeon, &c.]* By 3 H. 8, c. 11, s. 1, "no one shall act as a surgeon within the city of London, or [\*90] seven miles round, unless he be examined and licensed by the College of Surgeons, under the penalty of £5 per month. But notwithstanding this act, as it contains no prohibitory clause, it seems that a surgeon may maintain an action for his bill, without proving any license under it: *Gremare v. Le Clerc*, 2 Camp. 144; but see *Bensley v. Bignold*, 5 B. & A. 340, &c.; *Holt*, 528. At all events, it is incumbent on the deft. in such action to prove that the plt. was not regularly licensed as the act directs: 2 Camp. 146.

*Proof of Work done and Medicines supplied.]* This may be done by plt.'s servant, or other party, who can speak to the fact. In the absence of other satisfactory evidence, deft.'s servants may be called: see further, *post*, "*Work and Labour*." A surgeon may recover for attendance: *Poucher v. Norman*, 3 B. & C. 745; 5 D. & R. 649, s. c.

*Proof of Reasonableness of Charges.]* This should be proved as in ordinary cases: *post*, "*Work and Labour*," "*Attorney*."

#### *Evidence for Defendant.*

The deft. should be prepared to disprove plt.'s case. If deft. object that plt. is not licensed, under 3 H. 8, to practise as a surgeon, it has been held, that it is incumbent upon the deft. in such action to give evidence that the plt. is not regularly licensed as the act directs: *Gremare v. Le Clerc*, 2 Camp. 144; *sed quære supra*. Dft. may show that plt. was a physician, *Chorley v. Bolcot*, 4 T. R. 317, *Poucher v. Norman*, 3 B. & C. 745, 5 D. & R. 649, s. c.; or it will be sufficient for him to show that he assumed the character of a physician, although he had no diploma, and had no right to assume that character, as plt. will be bound thereby: *Lipscombe v. Holmes*, 2 Camp. 441; *Chorley v. Bolcot*, 4 T. R. 317; *ante*, 49. As the law implies an undertaking on the part of surgeons and apothecaries, that they will exert a reasonable degree of skill, *Seare v. Prentice*, 8 East, 348, the deft. may show



that his or the patient's complaint has been increased, or his health injured rather than benefited, in consequence of plt.'s gross unskillfulness or carelessness; and it will be a defence to any action for fees: *p. Ld. Kenyon, Kannen v. M'Mullen, Peake*, 59; *Duffit v. James*, cited 7 *East*, 480; *Duncan v. Blundell*, 3 *Stark*, 6; *post*, "*Assumpsit*," "*Attorney*." But this is only in cases of gross negligence; and, if it appear that the improper remedies or unfit medicines were administered under the advice of a physician, the surgeon or apothecary is, in all cases, entitled to recover: *Kannen v. M'Mullen, Peake Rep.* 59. In cases where an *empiric* professes to cure disorders in a specified time by sovereign remedies, and does not succeed in his cure, he cannot recover, *Hupe v. Phelps*, 2 *Stark*. 480; but this does not apply to a regular practitioner: *ib.* Where a surgeon leaves a blank in his bill for attendances, it will be a sufficient defence if deft. show that he has paid a reasonable sum: for, as *p. Ld. Kenyon, Tuson v. Batting*, 3 *Esp. Rep.* 193, "it is considering his demand in the light of a *quiddam honorarium* and leaving it to the generosity of the person he attends; and that person having paid money into court to a certain amount, it is to be taken as the sum which he considers as a fair remuneration for the plt.'s services, and which the plt. had left open in his bill; and that he cannot recover any more." Deft. should, if possible, be prepared to disprove the work done, or prove the unreasonableness of the charges, or account claimed: *post*, "*Assumpsit*," "*Evidence in Reduction of Damages*."

#### ACTIONS AGAINST APOTHECARIES AND SURGEONS.

[\*91] *Form of Remedy and Pleadings.*] A surgeon or apothecary is liable \*in *assumpsit* or case, for ignorance or unskillfulness, and for negligence in the exercise of his profession; as the law implies an undertaking or duty on their part to exercise due and reasonable skill, &c.: *Slater v. Baker*, 2 *Wils.* 359; *Seare v. Prentice*, 8 *East*, 348; *B. N. P.* 73. There is nothing peculiar relating to the form of the pleadings. See further, *post*, "*Attorney*," "*Assumpsit*."

*Evidence.*] Plt. must prove that deft. was a surgeon or apothecary by profession, or that he was retained and paid as such by plt., or that he especially engaged to cure the plt. for reward. Plt. must then give evidence as to the nature of deft.'s treatment: and he should call persons of skill and experience to prove that the treatment of the defendant was unskillful and improper; and that the wound or complaint, or increased wound or complaint, of the plt., resulted from such improper and unskillful treatment. The damages should be proved by showing the length of time plt. has been ill, that he will never again have the use of a limb or part of his body as before, the expense he has incurred, &c. The evidence for the deft. will consist in rebutting these proofs. See further, *post*, "*Attorneys, Actions against, for Negligence*."

## APPRENTICE.

ACTION ON AN INDENTURE OF APPRENTICESHIP, 91.  
ACTION FOR ENTICING AWAY AN APPRENTICE, 92.

*Action on the indenture of Apprenticeship.*

*Form of Remedy.*] Covenant is the usual remedy upon an indenture of apprenticeship against the party who covenanted for the due performance of it; but covenant does not lie where the binding is for less than seven years, 1 *Anst.* 256-7, or against an infant apprentice, *Gylbert v. Fletcher*, *Cro. Car.* 179, *Rex v. Hindrigham*, 6 *T. R.* 557; and the only remedy in the latter case would be against the party who covenanted for the infant's due performance of the indenture.

*Form of Pleadings—Declaration.*] There is nothing peculiar relating to the declaration in this case; which does no more than set forth the indenture, with a profert, and the breach, as in other actions of covenant: *post*, "*Covenant*." It has been held, in an action by an apprentice for not finding him victuals and other necessities, that a breach in the words of the covenant suffices: *Proctor v. Burdet*, 3 *Lev.* 170.

*Plea.*] The rules as to pleading in covenant here prevail: see "*Covenant*." Matters in discharge should be pleaded specially; so should performance. It is no plea to an action against a master for dismissing the apprentice, that the latter misbehaved himself. *Winstone v. Linn*, 1 *B. & C.* 460, 2 *D. & R.* 465, *s. c.*; and, in an action against the covenantor for the apprentice, it is no plea that the son faithfully served till he came of age, and then avoided the indenture: *Cuming v. Hill*, 3 *B. & A.* 59.

*Precedents.*] See form of precedent in action against a father for neglect of duty of apprenticeship, 2 *Chit. Pl.* 517; in action by the apprentice against master, *ib.* 519; by apprentice against executor of master, *ib.* 522; plea that the deft. provided board, &c., *ib.* 1004; that plt. absented himself, *ib.* 1003; that deft. did not discharge him, *ib.* 1006.

*\*Evidence for Plaintiff.*] The usual evidence to be adduced [\*92] in actions of covenant will be here applicable. The indenture should be produced and proved in the usual way, if deft. has pleaded *non est factum*: see "*Deed*." The breach should also be proved, if denied by deft. in his pleadings; and plt. should be prepared to support his answer to any special plea of deft.'s: see "*Covenant*."

*Evidence for Defendant.*] This must depend on the nature of the pleadings, which he should be prepared to support. No observations are here peculiarly requisite: see "*Covenant*."

*Action for Enticing away an Apprentice.*

See post, "Master and Servant."

*Form of Remedy.*] Case is the most usual and proper form of action for an injury of this nature: *Regina v. Daniel*, 1 *Salk.* 380; *Regina v. Collingwood*, *Raym.* 1116; *Hart v. Aldridge*, *Cowp.* 54; *Hambleton v. Vere*, 2 *Saund.* 169. The master may sue for the work and labour of the apprentice: *Foster v. Stewart*, 3 *M. & S.* 191; *Lightly v. Clouston*, 1 *Taunt.* 112; *Eades v. Vandeput*, 5 *East*, 39, *n.*

*Form of Pleadings.*] *Declaration* commences with a statement of the party's being the apprentice of the plt. In some precedents, the indentures of apprenticeship are stated at length, by way of inducement; but this is certainly unnecessary, and not advisable: *Hambleton v. Vere*, 2 *Saund.* 169. Where there is not a strict legal apprenticeship, it would in one count be advisable not to describe it so: *Ashcroft v. Bertles*, 6 *T. R.* 652. It should be stated deft. knew that the third person was plt.'s apprentice: 3 *Bla. Co.* 142; *Fores v. Wilson*, *Pea. Rep.* 55; *Winsmore v. Greenbank*, *Willes*, 582. The means of enticement or harbouring used by deft. need not be stated: *ib.* The damage by reason of the loss should be stated: *Eades v. Vandeput*, 5 *East*, 39; *Bird v. Randall*, *Burr.* 1352. Counts should be inserted, as well for the enticing away, as for the harbouring: *Blake v. Lanyon*, 6 *T. R.* 221. The general issue will generally suffice: see "*Case.*"

*Precedents.*] See form in case for enticing away apprentice: 2 *Chit. Pl.* 645, 6.

*Evidence for Plaintiff.*] Plt. should prove the apprenticeship by the indentures, which should be produced and proved in the usual way: see "*Deed.*" It should be proved deft. knew of the apprenticeship at the time of his enticing away or harbouring the apprentice; *Fores v. Wilson*, *Pea. Rep.* 55; *Pea. Ev.* 334; *Winsmore v. Greenbank*, *Willes*, 582. Slight evidence would suffice. If any express notice of it was given to deft., the same should be proved: see "*Notice.*" The mode of deft.'s causing the injury should, if possible, be proved; though this is not absolutely necessary. It will suffice to show the apprentice was enticed away or harboured by deft. The *damage* must be proved: *Eades v. Vandeput*, 5 *East*, 39; *Bird v. Randall*, *Burr.* 1352. The value of the services lost should be shown. The measure of damages is not to be ascertained at the actual loss plt. sustained at the time, but for injury done by causing the apprentice to leave plt.'s employment. *Gunter v. Astor*, 4 *Moo.* 12. The apprentice, or his father, or party entering into the indenture, would, it should seem, be a competent witness for either party, though sometimes a dangerous one.

*Evidence for Defendant.*] Deft. should be prepared to dis-  
[\*93] prove plt.'s case: he cannot, however, avail himself of any objection to the indenture of apprenticeship, *Keane v. Boycott*,

2 *H. Bla.* 511, *Westerdell v. Dale*, 7 *T. R.* 310, 1, 4, 1 *Anst.* 256; but he may show that the plt. was not a housekeeper, and of the age of twenty-four years, when the third party was bound to him: *Gye v. Felton*, 4 *Taunt.* 876. He should also be prepared to reduce the damages, as far as he can.



## ARBITRATION.

See *post*, "AWARD," and index, "ARBITRATOR."



## ARREST.

See "MALICIOUS ARREST," "PROCESS."



## ARTICLES OF WAR.

See "PUBLIC DOCUMENTS."



## ASSAULT AND BATTERY.

*Form of Remedy*, 94.

*Form of Pleadings*, *ib.*

*Precedents*,

*Declaration for an Assault and Battery*, 99.

*Second Count for a Common Assault*, *ib.*

*Third Count for spoiling Plaintiff's Clothes*, *ib.*

*by Husband for Battery of Wife*, *ib.*

*by Master or Father for Battery of Servant or Son*, 100.

*Plea, Son Assault Demesne*, *ib.*

*Son Assault in Defence of a Relative*, *ib.*

*Molliter Manus Imposuit to preserve the Peace, and prevent Plt. and third Person from fighting*, *ib.*

*in Defence of Possession of Shop, justifying as a Servant*, 101.

*justifying as Tavern-Keeper, to prevent Plaintiff leaving Tavern without paying his bill*, *ib.*

*Replication de Injuria*, 102.

*to Plea of Son Assault Demesne, that E. F. was possessed of a House, and that Plaintiff turned him out*, *ib.*

*New Assignment*, 103.

*Evidence for Plaintiff*, 103.

*Assault and Battery*, *ib.*

*Alia Enormia*, 105.

*Damages*, *ib.*

[\*94] \**Evidence for Defendant*, 106.

*General Issue*, *ib.*

*Plaintiff's first Assault*, *ib.*

*Moderate Correction*, 107.

*Defence of Relative, Servant, &c.*, *ib.*

*To preserve the Peace*, *ib.*

*Defence of Possession*, *ib.*

*Special Replication*, *ib.*

*Other Issues*, *ib.*

*Reduction of Damages*, *ib.*

### *Form of Remedy.*

THE form of remedy of an assault or battery, when not done under colour of legal process, is by an action of trespass: 11 *Mod.* 180. And in some cases trespass lies, though the act be done under colour of process: see "*Trespas*." It lies when the deft., by an unnecessary degree of violence, renders himself a trespasser: *Com. D. Tresp. C. 2.* It lies for an assault committed after process is determined, *Cro. J.* 379, or after an acquittal for a felonious assault, *Crosby v. Leng*, 12 *East*, 409, or for the battery of plt.'s wife, child, or servant, provided some services be thereby lost to plt.: *Ditcham v. Bond*, 2 *M. & S.* 436; *Robert Mary's case*, 3 *Co.* 113. A joint action against several defts. is sustainable: 2 *Saund.* 117, *a.* The party injured, may proceed by indictment and action at the same time, and will not be driven to his election: *Jones v. Clay*, 1 *B. & P.* 191; *Murphy v. Cadell*, 2 *ib.*, 137; *Rex v. Fielding*, *Burr.* 719.

### *Form of Pleading.*

*Declaration.*] The observations that will be found, *post*, "*Trespas*," as to the declaration, will here apply. The venue may be laid in any county: *Mostyn v. Fabrigas*, *Cowp.* 161; 1 *Saund.* 74, *n. 2.* As to the venue in actions against justices and other public officers, &c., see "*Declaration*," "*Venue*." As to the title of the term, &c., see *ib.* On special demurrer, the words "wherefore," and "whereas," would be objectionable, as not containing a positive allegation of assault, being merely by way of recital: *Wildgoose v. Kellaway*, 2 *Salk.* 636. But this would be otherwise in the *C. P.* by original, the writ being set out in the declaration: *White v. Shaw*, 2 *Wils.* 203; 1 *Chit. Pl.* 336, *n.* The day of the assault should be stated, but the precise day is immaterial. Where several assaults, at different times, have taken place, the usual allegation of their having been so committed, as well as a second or more counts should be inserted. Where it was alleged that the deft.

on such a day, and on divers other days and times, &c., *made an assault* on the plt., it was held bad on special demurrer; as one assault cannot be committed on different days: *English v. Purser*, 6 *East*, 395; *Mitchell v. Neal*, *Coup.* 828. But it would have been correct, had it been alleged that he "assaulted on, &c.," as that might allude to more assaults than one, *ib.* *Burgess v. Freelove*, 2 *B. & P.* 425. If the assaults be stated as having been made on a certain day, and divers days and times afterwards, plt. should take care to state a day so far back as will cover the first assault, as he will not be allowed to give in evidence more than one assault committed *before* the day stated: *Bul. N. P.* 86; 1 *Saund.* 24, n. 1; 2 *Saund.* 5, n. 3; *Hume v. Oldacre*, 1 *Stark.* 351. Care should be taken to describe the injury, according to the facts of the case, and only such parts of the following precedents should be adopted, as are applicable, and will be supported by the evidence to be adduced on the trial; but though the first count ought to contain a full \*statement of the injuries, in the order in which they were com- [\*95] mitted, and the damage consequent thereon; yet if the plt. prove any part of the count, he will be entitled to a verdict *pro tanto*, though he fail in proving the residue: *R. T. Hardw.* 121; 2 *Saund.* 74. b.; 4 *Mod.* 405. In an action by husband and wife, for the wife's sufferings, care should be taken not to include any statement of an injury or damage to the husband only: and so, in an action by the husband alone, for an assault on his wife, *per quod*, &c., care should be taken not to include any statement as to the personal sufferings of the wife: *Russel v. Corne*, 1 *Salk.* 119; *Com. D. Pleader*, 2 *A.* 1; *post*, "*Husband and Wife*." The facts need not be alleged to have been *vi et armis*: *Day v. Muskett*, 2 *Ld. Raym.* 985; 2 *Salk.* 640, s. c. 6 *Mod.* 80; *sed vide Com. D. Pleader*, 3 *M.* 7-8; *Lowe v. King*, 1 *Saund.* 81-2. It should conclude, "*contra pacem*;" *Raphael v. Verelst*, 2 *W. Bla. R.* 1058; *Com. D. Pleader*, 3 *M.* 8. The words "other wrongs, &c.," should be inserted, and under them damages and matters which naturally arise from the assault, or cannot with decency be stated, may be given in evidence, in aggravation of damages, though not stated in any other part of the declaration. But no matter which would of itself support an action, can be given in evidence under it: *post*, "*Trespass*." In an action by husband and wife, the declaration should conclude to the damage of both: *Com. D. Pleader*, C. 84. It is frequently advisable to add a second count for a common assault, for, if the declaration contain but one count, the plt., after trying to prove one assault, cannot waive that, and go into evidence of another: *Stante v. Prickett*, 1 *Camp.* 473. If there be any injury to personal property, such as tearing of clothes, &c., not merely consequential, but substantially independent of the assault, &c., a distinct count should be inserted for the same, with a view to get full costs, though plt. recovers less than 40s.: see *Tidd*, 1000; *Stead v. Gamble*, 7 *East*, 325. The special damages, if any, should be stated according to the facts: *post*, "*Case*."

*Plea.*] As to what pleas may be pleaded, the deft. may either plead by denying the assault, or showing a matter in justification of it, or both. He may justify an assault, &c., in defence of his person, if the deft.'s

assault be not in disproportion to that made by plt.: *Cockcroft v. Smith*, 2 *Salk.* 642; 1 *Ld. Raym.* 177, *s. c.*; or an assault in defence of a wife or husband, *Leeward v. Basilee*, 1 *Ld. Raym.* 62; 1 *Salk.* 407; or master, *ib.*; or child or parent, 3 *Salk.* 46; but not of a servant: *ib.*, *B. N. P.* 18. And, in order to entitle a servant to justify the defence of his master, he must show that his interference was necessary: *Barfoot v. Reynolds*, 2 *Str.* 953. A deft. may justify under the moderate correction of the plt. who was his apprentice, servant, or scholar: 3 *Salk.* 47. An officer may justify even a maihem to preserve discipline: *Bul. N. P.* 19. An assault and battery cannot be justified by reason of an amicable contest, *B. N. P.* 16; or from the plt.'s license, *Comb.* 218. A party may justify an assault and battery in defence of his house or goods; and the law allows him to lay his hands on the plt., after a request to go out, or to cease his endeavours against deft.'s goods; and if the plt. resist with force, the deft. will be justified in expelling the plt. with a strong hand, and, if a battery ensue, it will be considered the result of the plt.'s own act: *Com. D. Pleader*, 3 *M.* 17; 2 *Rol. A.* 548, *pl.* 2; *Bro. A. Trespass*, 128; *Weaver v. Bush*, 8 *T. R.* 80. But if the battery, in the first instance, be more than a mere gentle imposition of the hands, and accompanied by violence and outrage, as striking or knocking the party down, it could not be justified, *Gregory v. Hill*, 8 *T. R.* 299; but it will justify what the law calls an assault, or a mere legal battery; as was admitted on a question of costs: *Johnson v. Northwood*, 7 *Taunt.* 695; *Smith v. Edge*, 6 *T. R.* 562; *Rowe v. Tutte*, *Wils.* 14. Where the entry is forcible, as by breaking down a gate or door, a request to depart is not necessary, and the acts of violence on the part of the trespasser may be immediately opposed by any acts of necessary \*violence by the deft.: *Green v. Goddard*, *Salk.* 641. A wounding cannot be justified, merely in defence of possession, *Gregory v. Hill*, 8 *T. R.* 299; 3 *Salk.* 46; unless, indeed, the plt. attempt to enter the close with force: *ib.* Persevering after a request to desist in stopping an ancient light, will not justify plt. in throwing water on deft.: *Simpson v. Morris*, 4 *Taunt.* 821. A bare arrest is no justification of a battery, *C. T. Hardw.* 298; *Williams v. Jones*, 2 *Str.* 1049; *Truscott v. Carpenter*, 1 *Ld. Raym.* 229; unless it be pleaded by way of *molliter manus imposuit* to arrest: *C. T. Hardw.* 358. Plt.'s resistance, or attempt to escape, justifies a battery: *B. N. P.* 19. Deft. may plead a judgment recovered, *Fetter v. Beal*, 1 *Salk.* 11; 1 *Ld. Raym.* 339, *s. c.*; *post*, "*Judgment*;" and this though it was against another deft., if it was for the same assault; 2 *Lutw.* 944; *Broome v. Wooton*, *Yelv.* 68; or the statute of limitations, not guilty within four years: *Macfadzen v. Olivant*, 6 *East*, 388; 6 *Mod.* 246; *post*, "*Statute of Limitations*."

*As to the form of Plea.*] The general rules, as to the form of the pleas in trespass, here apply: *post*, "*Trespass*." The general issue denies the fact of the trespass alleged. In a late case, under a declaration for an assault and battery, and tearing of clothes, where deft. pleaded he was not guilty of the said supposed assaults, in manner and form as the plt. complained, it was held that the *modo et forma* included a denial of

the battery and *laceravit*, as well as the assault: *Weatherell v. Howard*, 3 *Burg.* 135. A deft. is not bound to justify who is not *prima facie* a trespasser: *Badkin v. Powel*, *Cowp.* 478. But, if the deft. was *prima facie* such trespasser, but relies on any matter of justification as a legal excuse for assaulting or beating the plt., he must plead that matter specially. When it appears that the party had no intention of committing an assault, as where he took hold of a person by the collar to prevent his fighting, he need not justify by pleading specially, but "may give the facts in evidence, for the purpose of showing that there was not any assault, which is matter to be left to the jury: *per Legge, B.*, in the case of *Griffin v. Parsons*, *MSS.*, cited in *Selv. N. P.* 28; and in *Williams v. Jones*, *Rep. Tem. Hardw.* 301. His lordship says, "the party's *intention* must be considered, for people will sometimes, by way of joke or friendship, clap a man on the back, and it would be ridiculous to say that in every such case a man must justify, and may not plead not guilty; the case of *Wilson v. Dodd*, 2 *Roll. Abr.* 546, is directly in point;" and in 4 *Mod.* 405. "In assault and battery the deft. pleaded that the horse took fright, and ran upon the plt., who continued in the way, &c., and the plea was held bad on demurrer, and that deft. should have pleaded the general issue, for, if the horse ran away against his will, he could not have been found guilty, because it cannot be said, with any colour of reason, to be a battery in the rider." Matter of accident may be given in evidence, under the general issue, *ib.* The deft. should plead specially, *son assault demesne*, *Gregory v. Hill*, *R.* 87, 299, 1 *Saund.* 77, 296, n. 1; moderate correction, *Watson v. Christie*, 2 *B. & P.* 224; *molliter manus imposuit*, to preserve the peace, or a justification in defence of the possession of real or personal property, *Weaver v. Bush*, *P. T. R.* 78, 299, *Green v. Goddard*, 2 *Salk.* 641; or by authority of law, under or without process, *Smith v. Edge*, 6 *T. R.* 562, *Hawe v. Planner*, 1 *Saund.* 10, *Lowe v. King*, *ib.*, 79, *Barker v. Braham*, 3 *Wils.* 370. Some particular statutes allow these special defences, and others to be given in evidence under the general issue. In some cases, where it is desirable for the deft. to have the general reply under special pleas of justification, it is best not to plead the general issue: 3 *Camp.* 366. It is not in general advisable to plead *son assault demesne*, or any other plea of justification, specially, in actions for a trifling assault, if there be not satisfactory evidence to sustain it, for, the battery being admitted, plt. will get full costs, though he obtain less than 40s.: *Smith v. Edge*, 6 *T. R.* 562; *sed vide Brennan v. Redmond*, 1 *Taunt.* 16.

\*The enumeration of the particular trespasses in the com- [\*97] mencement of the plea, which can and are intended to be justified, though usual, and of assistance in framing the plea, are not absolutely essential. Deft. must, if he states them, take care to justify no more than he can do in law. Where the justification is transitory, it must follow the place in the declaration: *Purset v. Hutchings*, *Cro.* 842, *Bridgwater v. Bything*, 3 *Lev.* 113, 2 *Lut.* 1435; and, if a justification be at the same place and time, an averment of its identity with the trespass in the declaration, is unnecessary: *Carth.* 280. In all pleas of justification, deft. must admit the assault: *Gibbon v. Pepper*, 2 *Salk.*



637; 1 *Ld. Raym.* 38, s. c.; *Rowe v. Tutte*, 1 *Wils.* 14. But a plea, to an assault and battery, of *molliter manus imposuit*, is good: *C. T. Hardw.* 358. Where a servant justifies in defence of his master, it must be alleged in his plea, that his interposition was necessary; *Barfoot v. Reynolds*, 2 *Str.* 953. In a justification of moderate correction of a seaman for disobedience, and of which he was found guilty by a court martial, it is advisable to plead such finding specially, to operate as an estoppel: *Hannaford v. Hume*, 2 *C. & P.* 148. In justifying in defence of property, it is sufficient to allege that the party was possessed, without setting forth the particulars of his title; *Johns v. Whitley*, 3 *Wils.* 71, *Weaver v. Bush*, 8 *T. R.* 78, *Gregory v. Hill*, *ib.* 299, such an allegation being merely matter of inducement: *Cro. Car.* 138. In justifying under process of a competent court, such process must be set forth with particularity: *Co. Lit.* 283, d.; 3 *Mod.* 137; *Com. D. Plead-er*, E. 17. If the deft. by his plea justify a beating and wounding, he must state that some force was used or attempted by the plt.; but in some cases a battery only may be justified by way of *molliter manus imposuit*: *Smith v. Edge*, 6 *T. R.* 562, *Johnson v. Northwood*, 7 *Taunt.* 689, 1 *Moore*, 420, s. c. *infra*. See further, as to pleas justifying imprisonment by constables, and those in aid of them, *post*, "*False Imprisonment*," and as to justifying under a suspicion of felony, &c., see *ib.*

*Replication.*] The general rules as to the replication in trespass here prevail: see "*Trespass*." Where the defendant's plea is untrue, and it is matter of fact to be ascertained by the jury, whether deft. committed the trespass, &c., of his own wrong, the plt. ought to reply *de injuria*; and, where the deft. pleads in *excuse* of any injury to the person, *de injuria* is good; *Jones v. Kitchin*, 1 *B. & P.* 79: as if deft. plead *son assault demesne*, defence of father, &c. So this general replication suffices, where title is alleged as matter of inducement, *Com. D. Plead-er*, F. 21, 2 *Saund.* 295, n. 1. But where the plea is true, that plt. did first assault deft., and the plt. has any ground of justification for so doing, he must state in his replication such matter of justification specially, *Carth.* 281, whether it consist of matter of *title*, or *interest*, or *authority of law*, or authority in fact, derived from the opposite party, or matter of *record*, *Step. Pl.* 188, 2 *Saund.* 295, n. *Carth.* 280: as where the plt. did in fact commit the first assault in defence of his father, son, &c., or in defence of possession, &c.: 1 *Chit. Pl.* 512. If deft. justifies under process of a court of record, plt. should deny the issuing of the writ or warrant, &c., 1 *Saund.* 299. b., or protest the writ or warrant, and reply *de injuria*, as to the residue: *ib.* If the plt. admits that deft. had a right to commit the assault, but relies on deft.'s having committed some excess in so doing, a replication *de injuria* would suffice, *Gilb. C. P.* 154, *Weaver v. Bush*, 8 *T. R.* 81, *Cockcroft v. Smith*, 1 *Salk.* 642; but, if the excess was such as to amount to a substantive and distinct assault, then he should new assign: *Monprivatt v. Smith*, 2 *Camp.* 176, 7; *Cheasley v. Barnes*, 10 *East*, 73. Where, in an action for assault, the plt. declared that the deft. beat, bruised, and wounded him, to a plea of *son assault demesne*, the plt. replied, *de in-*

*juria sua propria*, and it was proved that the latter got off his horse, and held up his stick at the deft., when he struck him, it was held that the plt. should have replied specially; and, it having been left to the \*jury whether the plt. was so far the aggressor as to justify [\*98] the assault committed on him by the deft., and they having found in the affirmative, the court refused a new trial: *Dale v. Wood*, 7 Moo. 33; and see *Dye v. Leatherdale*, 3 Wils. 20; *Phillips v. Howgate*, 5 B. & A. 220; *Rowe v. Tutte*, Wils. 17. The following observation of *Blackstone, C. J.*, in the case of *Sayre v. The Earl of Rochford*, 2 W. Bla. R. 1196, explains the whole scope of the replication *de injuria*, and the two preceding forms. "Nothing ought to be admitted in evidence but what is material to the issue, joined either to prove or disprove it. Nothing is in issue upon a special plea, but what is directly traversed; and the general replication *de injuria sua propria absque tali causa*, traverses all the matters, and nothing but the matters, contained in the plea. The plt. declares on a part which is at first view a trespass: the deft., in his plea, acknowledges that fact, but states such new circumstances as (if true) amount to a justification. If the plt. can suggest additional new matter, which shows that the deft.'s assertions (though true) will not justify the trespass committed, he ought to reply that new matter in a special replication, that the defendant may demur, or take issue upon it." It is in general advisable to plead *de injuria* when practicable, as it puts in issue every material allegation of deft.'s plea: *Com. D. Pleader, F.* 18 to 24; *Cockerill v. Armstrong*, Wils. 100. The words *without the cause*, which means without the matter of excuse alleged, though in the singular number, puts in issue all the facts in the plea, which constitute but one cause, and such a replication is sufficient to two or more pleas by different defts: *Gilb. C. P.* 51; *Chit. Pl.* 530. Though deft. pleads a local defence, plt. may vary in his replication, either in time or place: *Neville v. Packman*, 1 *Ld. Raym.* 121; 2 *Lutw.* 1435.

*New Assignment.*] As to new assignments in general, see *post*, "*New Assignment*." Where there have been two assaults, and one of these assaults may have been justifiable, being committed in self defence, and the other may not be so, and the declaration contains but one count, and the deft. pleads *son assault demesne*, the plaintiff should new assign the unjustifiable assault: 1 *Saund.* 299, a. n. 6. In the case of *Randle v. Webb*, 1 *East*, 37, in an action of assault, deft. pleaded *son assault*, and proved an assault on the 27th of June. Plt.'s counsel then offered evidence of an assault on the 28th, the day in his declaration. But it was ruled by *Buller, J.* "that *the day laid in the declaration* being immaterial, the deft.'s proving *son assault* on any day previous to the bringing of the action, was a complete answer to it: for that, if the plt. had intended to have made the day material, he should have new assigned it:" see *anon.* 2 *Ld. Raym.* 1015. The principle of the above decision is obvious. The plt. alleges an assault, which the deft., under the plea of *son assault* justifies, averring it to be the same as that in the declaration: if the plt., therefore, by *de injuria*, traverses the deft.'s plea, he admits it to be the same assault, though, in fact, it may be a dif-

ferent one from that which is intended in the declaration; and by such admission he is *estopped* from proving a battery at another time, when plt. did not assault the deft., unless he new assigns, alleging it to be another and different assault. In some cases, if there are two counts in the declaration, the plt. may, by new assigning, preclude himself from giving evidence of two assaults: see *Atkinson v. Matteson*, 2 T. R. 172, (*post*, "*Trespass*," "*New Assignment*."). New assignments are not of frequent occurrence in practice, for, if there be as many counts as there were assaults, and some of them cannot be justified, the plt. may prove those without a new assignment, because, as to them, the deft. will be obliged to plead not guilty: *B. N. P.* 17; 1 *Step. Pl.* 262, &c. The new assignment is, as it were, a repetition of the declaration, pointing the true ground of complaint, as different from that justified by the plea, and is consequently to be framed so as to include all the material allegations of the declaration; as to those parts justified by the plea, it requires them to be accurately specified: 1 *Saund.* 299, c.; *Step.* [\*99] *Pl.* 245; see "*New Assignment*." \*In many cases it is prudent to let judgment go by default to the new assignment: *post*, "*New Assignment*."

### Precedents.

#### DECLARATION FOR ASSAULT AND BATTERY, AND INJURY TO PLY.'S CLOTHES, STATING THE FACTS FULLY.

(*Commencement as usual: see "Trespass."*) For that the said deft., on, &c., (and if the deft. assaulted plt. on more times than one, then say, and on divers days and times, between that day, and the day of exhibiting this bill, or in C. P. the day of the commencement of this suit), with force and arms, assaulted the said plt., to wit, at, &c., (venue), and then and there seized and laid hold of the plt., and with great force and violence pulled, shook, and dragged about 'the said plt., and gave and struck the said plt. a great many violent blows and strokes on divers parts of his body; and also, then and there, with great force and violence, knocked, cast, and threw him, the said plt., down to and upon the ground, and then and there violently kicked the said plt., and gave and struck him a great many other blows and strokes, and also; then and there, with great force and violence, rent, tore, and damaged the clothes and wearing apparel, to wit, one coat, &c. (state the apparel injured), of the said plt., of great value, to wit, of the value of £30, which he, the said plt., then and there wore. By means of, which said several premises, he, the said plt., was then and there greatly hurt, bruised, and wounded, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time; to wit, for the space of six weeks, then next following (or if plt. is still labouring under the injury, say, to wit, from thence hitherto,) whereby he was, during all that time, and still is, hindered and prevented from doing, following, or transacting his lawful affairs and business, and hath been obliged to lay out and expend a large sum of money, to wit, the sum of £100 (state a sufficient sum), in and about the curing and healing himself of his aforesaid wounds, sickness, and indisposition, to wit, at, &c., aforesaid.

#### SECOND COUNT, FOR A COMMON ASSAULT.

And, also, for that the said deft., on the day and year aforesaid, with force and arms, at London aforesaid, made another assault upon the said plt., and then and there beat, bruised, wounded, and illtreated him, so that his life was despaired of. (*Omit some of this, if the injury was but slight.*)

#### THIRD COUNT, FOR THE INJURY TO PLY.'S CLOTHES.

And, also, for that the said deft., on, &c., with force and arms, at, &c., aforesaid, tore, damaged, spoiled, and destroyed divers goods and chattels of the said plt., to wit, one other coat, &c., of a large value, to wit, of, &c., and other wrongs, &c. (*Conclude as usual in Trespass: see "Trespass."*)

BY HUSBAND ALONE FOR BATTERY OF A WIFE.

(Commencement as usual, see "*Declarations and Trespass.*") For that the said deft. on, &c., with force and arms, &c., made an assault on E. F., then and still being the wife of the said plt., to wit, at, &c., and then and there violently beat, kicked, bruised, and illtreated the said E. F., so then and there being the wife of the said plt., as aforesaid, insomuch that she, the said E. F., by means of the premises, then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, whereby he, the said plt., during all that time, lost and was deprived of all the comfort, benefit, and assistance of the said E. F., his said wife, in his domestic affairs, which he might and otherwise would have had, but thereby also, he, the said plt., was then and there forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the endeavouring to heal and cure the said E. F., his said wife, of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid, to wit, at, &c., aforesaid; and other wrongs to the said plt. then and there did, against the peace of our said lord, the king, and to the damage of the said A. B., of £—; and therefore he brings his suit, &c.

BY A MASTER OR FATHER FOR THE BATTERY OF HIS SERVANT OR SON.

\* For that the said deft., on, &c., with force and arms, &c., made an assault on [100] E. F., then and still being the son and servant (or servant only) of the said plt., to wit, at, &c., and then and there beat, bruised, wounded, and illtreated the said E. F., insomuch that, by means thereof, the said E. F., then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time, he, the said plt., lost and was deprived of the service of his said son and servant (or servant only), and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such service, to wit, at, &c. aforesaid.

See other declarations for assaults and false imprisonment, *post*, "*False Imprisonment,*" for assault, &c. on board a ship, 2 *Chit. Pl.* 862, for assault and excluding plt. from house, &c. *ib.* 862, by husband and wife for assault on wife, *ib.* 864.

PLEA OF SON ASSAULT DENIETH.

(General issue, *post*, "*Trespass.*") And, for a further plea in this behalf (if only part of the trespasses stated in declaration are justified, say, as to the said assaulting, beating, &c., in the said declaration mentioned), the said deft., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plt. ought not to have or maintain his aforesaid action thereof against him; because, he says, that the said plt., just before the said time when, &c., to wit, on the day and year aforesaid, at London aforesaid, with force and arms, made an assault upon him, the said deft., and would then and there have beaten and ill-treated him, the said deft., if he had not immediately defended himself against the said plt. Wherefore the said deft. did then and there defend himself against the said plt., as he lawfully might, for the cause aforesaid; and, in so doing, did necessarily and unavoidably a little beat, wound, and ill-treat, the said plt., doing no unnecessary damage to the said plt. on the occasion aforesaid. And so the said deft. saith, that, if any hurt or damage then or there happened to the said plt., the same was occasioned by the said assault so made by the said plt., on him, the said deft., and in the necessary defence of himself, the said deft., against the said plt.; which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plt. hath above complained. And this the said deft. is ready to verify. Wherefore he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him.

SON ASSAULT IN DEFENCE OF RELATIVE, &c.

(First plea, general issue: *post*, "*Trespass.*"—Second plea, *actio non*, as usual.) Because he saith that the said plt., just before the said time, when, &c., to wit, on the same day and year aforesaid, at, &c., aforesaid, with force and arms, &c., made an assault upon E. F., then and there and still being the father of the said deft., and would then and there have beat and ill-treated him, the said E. F., if he, the said deft., had not immediately defended the said E. F., wherefore he, the said deft., did then and there defend the said E. F., against the said plt., as he lawfully might, for the cause aforesaid; and, in so doing, did necessarily and unavoidably commit the said supposed trespasses in the said declaration mentioned, doing no unnecessary damage to the said plt., on the occasion aforesaid. And so the said deft. says, that if any hurt or damage then or there happened to the said plt., the same was occasioned by the said assault so made by the said plt., upon the said E. F., and in the necessary de-

fence of him, the said E. F., against the said plt.; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plt. hath above thereof complained against him, the said deft. And this, &c. *(Conclude with a verification, as supra.)*

**MOLLITER MANUS TO PRESERVE THE PEACE, FLT. AND A THIRD PERSON BEING FIGHTING TOGETHER.**

*(First, general issue, as post, "Trespass."—Second, as follows.)* And, for a further plea in this behalf, the said deft., by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says, that the said plt. ought not to have or maintain his aforesaid action thereof against him, because [101] he says, that the said plt., and one E. F., at the said time, when, &c., at, &c., aforesaid, were fighting together, and striving, with force and arms, to beat and wound each other, against the peace of our lord the now king; whereupon the said deft., being then and there present for the preservation of the peace of our said lord the king, and that the said plt. and E. F. might do no hurt to each other, and in order to separate and part them, then and there gently laid his hands upon the said plt., as he lawfully might, for the cause aforesaid; which are the said supposed trespasses in the said declaration mentioned, and whereof he, the said plt., hath above thereof complained against him, the said deft. And this, &c. *(Conclude with a verification, as supra.)*

**PLEA THAT A. B. WAS POSSESSED OF A SHOP; AND MOLLITER MANUS BY THE DEFT., AS SERVANT TO A. B., TO TURN HIM OUT.**

*(Plea 1st, not guilty: see "Trespass.")* And, for further plea as to, &c., by leave, &c. *(actio non)*, because he says that one A. B., long before, and at the said time, when, &c., was, and still is, lawfully possessed of, and in, a certain shop, with the appurtenances, situate, lying, and being, in the parish of, &c., in the county of, &c.; and, being so possessed thereof, she, the said plt., at the said time, when, &c., with force and arms, &c., entered and came into the said shop of the said A. B., and there made a great noise, disturbance, and affray, in the said shop, and then and there greatly disturbed and disquieted the said A. B. in the peaceable and quiet possession, use, and occupation, of his said shop; and, thereupon, he, the said deft., as the servant of the said A. B., and by his command, then and there, in the said shop, civilly requested the said plt. to go and depart out of the said shop, and to cease her said noise and disturbance; which the said plt. then and there refused to do, and still stayed and continued in the said shop, making and continuing such her said noise and disturbance therein, without the leave and license, and against the will, of the said A. B. Whereupon the said deft., as the servant of the said A. B., and by his command, at the said time, when, &c., at, &c., in, &c., gently laid his hands upon the said plt., in order to pull, push, put, and remove, the said plt. from and out of the said shop; and was at the said time, when, &c., gently pulling, &c., the said plt. from and out of the said shop, whereupon the said plt., being angry and in great wrath, then and there, with force and arms, &c., in the said shop, made an assault on the said deft., and would then and there have beat, bruised, wounded, and illtreated him, the said deft., if he, the said deft., had not then and there immediately defended himself against the said plt.; wherefore the said deft. did then and there immediately defend himself against the said plt., as he lawfully might for the cause aforesaid: and so the said deft. says, that if any mischief or damage happened to the said plt., the same so happened unto her from the said assault by her made on the said deft. and in the defence of him, the said deft., in manner aforesaid, which are, &c., whereof, &c., and this, &c., wherefore, &c., if, &c.

**JUSTIFICATION AS A TAVERN-KEEPER, BY MOLLITER MANUS IMPOSUIT, TO PREVENT FLT. FROM LEAVING DEFT.'S HOUSE WITHOUT PAYING FOR WHAT HE EAT AND DRANK.**

*(Plea 1st, not guilty: see "Trespass.")* And, for further plea in this behalf, she, the said deft., by leave of, &c., *(actio non)*, because she says that, before and at the said time in the said declaration mentioned, to wit, at, &c., she, the said deft., was the owner and occupier of, and kept a certain common licensed wine, tavern, and victualling-house, and then and there exercised and carried on the business of a tavern-keeper and victualler in the said house, and the said deft., so being a tavern-keeper and victualler, and so keeping such house as aforesaid, the said plt., before the said time, when, &c., came into the said house, and then and there called for and caused to be brought to him, in the said house, victuals and drink, and then and there eat and drank and consumed the same, and thereby then and there incurred and became liable to pay to the said deft. a reckoning, to a large amount, to wit, to the amount of two pounds fifteen shillings and sixpence, of lawful money of Great Britain, of which the said plt. then and there had notice. And the said deft. in fact further saith, that although she had then and there a lawful demand upon the said plt. for and on account of the said

reckoning, to the amount aforesaid, and although the said reckoning and payment thereof was also then and there, in the said house, in due manner demanded of the said plt. by her, the said deft., yet the said deft. in fact says, that the said plt. did not then [102] and there pay or discharge the said reckoning and demand, but then and there wholly refused so to do, and was then and there about to leave and depart from the said house of the said deft., and would then and there have departed from the said house of the said deft., without paying or discharging the said reckoning and demand, had he not been prevented from so doing; whereupon the said deft., in order to prevent the said plt. from so doing, and in order to obtain payment of the said reckoning and demand at the said time, when, &c., to wit, at, &c., in, &c., in the said house of her, the said deft., gently laid her hands upon the said plt., and a little held and detained him, as she lawfully might for the cause aforesaid, whereupon the said plt., being greatly agitated, with force and violence, then and there assaulted her, the said deft., and would then and there have beat, bruised, wounded, and ill-treated her, if she had not then and there defended herself. Wherefore she, the said deft., did then and there defend herself against the said plt., as she lawfully might, for the cause aforesaid; and so she saith, that if any mischief or damage then and there happened to the said plt., the same happened unto him and proceeded from the said assault, so by him made upon the said deft. as aforesaid, and in the defence of her, the said deft., from the same, which said premises are the same, &c.; whereof, &c., and this, &c. Wherefore, &c. (There was a third plea, same as the second, only saying that deft. kept a victualling-house instead of a tavern, and that plt. was otherwise accommodated in deft.'s house, besides eating and drinking.)

See other pleas, justifying assaulting and imprisoning plt. under authority of law, with and without process, *post*, "*False Imprisonment*;" to preserve the peace, *ib.* and 3 *Chit. Pl.* 1069, 1071; moderate correction of an apprentice or seaman for disobedience, &c., 3 *Chit. Pl.* 1072; defence of possession and *molliter manus imposita* to turn plt. out of house, *ib.* 1073; the like of a public house, *ib.* 1074; the like in resistance of plt.'s entering into a house, *ib.* 1076; the like merely in defence of possession of a close, *ib.* See pleas of Statute of Limitations, award, satisfaction, and other such general pleas, *post*, "*Trespass*."

REPLICATION DE INJURIA.

And as to the said plea by the said deft., last above pleaded in bar to the said several trespasses in the introductory part of that plea mentioned, the said plt. says, that by reason of any thing therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said deft., because he says, that the said deft., at the said time, when, &c., of his own wrong, and without the cause in his said last-mentioned plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said plt. hath above complained. And this he prays may be inquired of by the country.

TO PLEA OF SON ASSAULT DEMISEN, THAT E. F. WAS POSSESSED OF A HOUSE AND THAT PLY., AS HIS SERVANT, TURNED DEFT. OUT.

(*Precludi non, as usual.*) Because he saith, that long before, and at the said time, when, &c., in the said first count mentioned, one E. F. was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being in the parish aforesaid, and being so possessed thereof, the said deft., just before the said time, when, &c., in the said first count mentioned, was wrongfully and unjustly in the said dwelling-house, making a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance, without the license or consent, and against the will of the said E. F., for a long space of time, to wit, until and at the said time, when, &c., in the said first count mentioned, and thereby then and there greatly disturbed and disquieted the said E. F. and his family, in the peaceable and quiet possession, use, and enjoyment of the said dwelling-house, whereupon he, the said plt., at the said time, when, &c., in the said first count mentioned, as the servant of the said E. F., and by his command, requested the said deft. to cease his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said deft. then and there refused to do, whereupon the said plt., as such servant of the said E. F., and by his command, gently laid his hands upon the said deft., in order to remove him, the said deft., from and out of the said dwelling-house, as he lawfully might for [103] the cause aforesaid, and which said laying of hands by the said plt. on the said deft., in manner and for the cause aforesaid, was the said supposed assault by the said deft. in his said second plea mentioned to have been committed by the said plt.; and thereupon the said deft., being thereby then and there greatly irritated and enraged, at the said time, when, &c., in the said first count mentioned, of his own wrong committed the said trespasses in the introductory part of the second plea mentioned, in manner and form as the said plt. hath above thereof complained against the said deft. And this he, the said plt., is ready to verify. And the said

plt. is also ready to verify, that he did not assault the said deft. as in the second plea mentioned, elsewhere than in the said dwelling-house of the said E. F. Wherefore he prays judgment and his damages by him sustained on occasion of the committing of the said trespasses in the introductory part of the said second plea mentioned, to be adjudged to him, &c.

See other replications to plea of defence of possession of close, that plt. had a right of way over it, 3 *Chil. Pl.* 1203, and the replications to justifications under process, &c., to actions for false imprisonment, *post*, "*False Imprisonment*."

#### NEW ASSIGNMENT.

And, as to the said plea of the said deft. by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the said plt. says, that by reason of any thing in that plea alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said deft., because he says that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said deft., heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, at — aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose than in the said second plea mentioned, made another and different assault upon the said plt. than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated him in manner and form as the said plt. hath above thereof complained, which said trespasses, above newly assigned, are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done; and this the said plt. is ready to verify. Wherefore, inasmuch as the said deft. hath not answered the said trespasses above newly assigned, he, the said plt. prays judgment, and his damages by him sustained by reason of the committing thereof, to be adjudged to him, &c.

#### *Evidence for Plaintiff.*

*Assault, &c. and Cause of Action.*] The general issue puts plt. upon proof of the assault and battery stated in the declaration; and, when this plea is pleaded, it is usual for the plt. to begin: *Step. P.* 292. But, where special pleas of justification are pleaded without it, the deft. begins, and must first establish his plea before the question of damages is to be gone into, *Bedell v. Russell*, 1 *R. & M.* 293, and see 3 *Camp.* 361, *post*, "*Evidence*;" and the plt. need give no evidence unless to aggravate damages or invalidate the deft.'s proof: *Guy v. Kitchiner*, *Str.* 1271; 1 *Wils.* 171, s. c.

With respect to what amounts to an *assault*, it consists of an *intentional* attempt to commit an act of violence upon the person of another, as striking at him, within reach, with his fist, stick, &c., or drawing a sword, or presenting a gun, or throwing any thing at him: *Finch, B.* 3, c. 9.; 6 *Mo.* 173-4; *Ginner v. Sparkes*, *Salk.* 79; 1 *Sehu. N. P.* 27. But striking at another, at such a distance as could not strike the plaintiff, as to assault, *Com. D. Battery, C.* A mere menace or words do not constitute an assault: *Bac. Ab. Assault, A.*; 1 *Hawk. P. C.* c. 62, s. 1. If a man lay his hand on his sword and say, if it were not for so and so, I would not take such language, it is no assault, *Tuberville v. Savage*, 1 *Mod.* 3, as it is the *intention* that constitutes the offence. Where the plt. took the deft. by the collar, in order to separate him from a person he was fighting with, whereupon the deft. beat him, on objection that the plt. ought to have replied that matter specially to the plea of *son assault demesne*, *Legge, B.* observed, "that the evidence was not offered for the purpose of showing

that there was no assault, for it was the *quo animo* which constituted the assault, which was matter to be left to the jury:" *M. S.* A battery, which always includes an assault, is the accomplishment of the assault by an immediate act of force committed on the person, *Com. D. Battery*; and imposition by hands, or any thing or instrument, by force applied to plt.'s person against his will, is a battery: *Skin.* 387; *Green v. Goddard*, 1 *Salk.* 641. Striking a horse upon which a party is riding, whereby he is thrown, is a battery: 1 *Mod.* 24, 1 *Sid.* 493. And there is a battery in all cases where there is an immediate injury from an immediate act of intentional force by the deft. The degree of force with which it was done makes no difference, and "it is immaterial whether the injury be wilful or not:" *Leame v. Bray*, 3 *East*, 602; *Underwood v. Hewson*, 1 *Str.* 596, 599. But, where the act is inevitable, and the conduct of deft. entirely without fault, it is *damnum absque injuria*, and does not constitute a legal battery, *Hob.* 134, *Scot v. Shepherd*, 3 *Wils.* 403, *Wakeman v. Robinson*, 1 *Bing.* 213, as it would not include an assault: *Co. Lit.* 253. The intention of the party ought, it would appear, to be construed with reference to the principle, "that every man shall be presumed to contemplate that which is the natural and immediate consequence of *his* act:" he will be held liable for every act of negligence: thus—where the deft. was uncocking a gun, and the plt. standing by, and the deft. from want of care, allowed the gun to go off, and wound plt., he was held liable for a battery: *ib.*

The plt. should prove the allegations contained in his declaration by going into the circumstances of his case at length, as to the manner in which the assault and battery were committed, the deft.'s conduct and expressions, the degree of violence used, and the extent of the injury. Any admissions made by deft. of the assault, should be proved: *ante*, 48, "*Admissions.*" Plt. cannot give in evidence a conviction on an indictment for an assault and battery: *Jones v. White*, 1 *Str.* 68. The plt. is not bound to prove the whole of the facts as stated; deft. may be found guilty of an assault only, though an assault and battery be stated: 4 *Mo.* 405, *B. N. P.* 94.

The day or place stated in the declaration is immaterial: *B. N. P.* 86; *Webb v. Turner*, *Str.* 1095. Where *son assault* is pleaded, and the declaration is entitled generally of the term, an assault within the term may be proved: *post*, "*Declaration;*" 2 *Str.* 1271; 1 *Wils.* 171, *s. c.* The plt. may prove as many distinct assaults, &c., as there are counts in the declaration, *B. N. P.* 86, *Webb v. Turner*, *Str.* 1095; or, if the assaults are laid with a *continuando*, he may prove any assaults committed within the days laid in the *continuando*, *B. N. P.* 86, and one assault before the day stated: *ib.* If there is but one count in the declaration, the plt., after having elected to prove one assault and failed, will not be allowed to give evidence of another: *Stante v. Prickett*, 1 *Camp.* 473. And, when the declaration contains two counts, and the deft. suffers judgment by default on one, and pleads not guilty to the other, and on the trial one trespass only is proved, the deft. will be entitled to a verdict: *Compare v. Hicks*, 7 *T. R.* 727. And, where the declaration contains two counts, and there is a justification pleaded to one of them, which is admitted by the replication, the plt. cannot reco-



ver, unless he show that two were committed: *Atkinson v. Matteson*, 2 T. R. 172; 1 Selw. N. P. 38. Where, upon an issue on *son assault demesne*, and the declaration confines the plt. to one assault only, the deft. proves that he was assaulted before the day mentioned in [\*105] the declaration, \*the plt. cannot give in evidence an assault on the day without new assigning: *Randle v. Webb*, 1 Esp. Rep. 38, ante, 98. But, upon not guilty pleaded, the plt. may give in evidence an assault and battery at any time or place: *Brownl.* 233. Though the declaration contain several counts, yet if deft. pleads that the assaults therein mentioned are one and the same, which the plt. does not deny, he cannot give in evidence more than one assault: *Gale v. Dalrymple*, R. & M. 118. Plt. should, in such case, have demurred, or denied they were the same. When the action is brought against several for a joint trespass committed at a particular time, he must confine himself to that period; and, if all the defts. were not then concerned in the trespass committed at that time, the plt. cannot have recourse to a trespass committed at any other time, when some only of the defts. were concerned, who were not implicated in the first transaction, for some of the defts. might thereby be subjected to damages for a trespass in which they had no concern: *Sedley v. Sutherland*, 3 Esp. Rep. 202.

Where deft. pleads specially, the plt. should be prepared with evidence to rebut the facts stated in deft.'s pleas: much of this may, indeed, be done by a cross-examination of deft.'s witnesses. If plt. has replied specially, he must be prepared to prove the facts stated in the order of the replication; as, in the case of plt.'s assault in defence of possession, or under a claim of right of way, &c., if access be replied, it must be proved by plt. As an assignment admits the justification mentioned in the deft.'s plea, that assault is out of the question, and the plt. must go into evidence of the one set out in the new assignment, and produce his evidence as he would in support of a declaration.

*Alia Enormia.*] The plt. will not be suffered to give in evidence injuries which the plt. received, unless expressly stated in the declaration: *Lowden v. Goodrick*, Peake, 46; see post, "*False Imprisonment*" and "*Trespass*;" evidence under "*Alia Enormia*."

*Damages.*] The plt. cannot give in evidence any special damage but that stated in the declaration, post, "*Damages*," nor any remote consequence as special damage: *Moore v. Adam*, 2 Chit. Rep. 198. The special damage must be the clear immediate result of the act which is complained of: *ib.* The damages may be assessed, not for the mere corporal injury, which in many cases may be very trifling; and the jury are not obliged to confine themselves to the mere pecuniary loss, but may award exemplary damages in proportion to the malicious or insulting conduct of the deft. Although the plt. is not at liberty to prove several assaults under his pleading, in order to support a verdict, he may give them in evidence as evidence of malice, and thus increase the damages: 2 Ph. Ev. 194. The circumstances which accompany and give character to the assault, may be given in evidence to enhance the damages: *Bracegirdle v. Orford*, 2 M. & S. 77. Time and place, when and

where the assault was committed, may frequently enhance the damages: 3 *Wils.* 19. *Heath, J.*, observed, in *Merest v. Harvey*, 3 *Taunt.* 442, "It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages: *Bracegirdle v. Orford*, 2 *M. & S.* 77. In a joint action against several deft.'s, the damages cannot be severed, so as to give more damages against one than the other; but a verdict may be given against both to the amount which the jury think the most culpable ought to pay: *Brown v. Allen & or.*, 4 *Esp. Rep.* 158; *Loufield v. Bancroft*, *Str.* 910; *Sel. N. P.* 39. And the plt. can have but one satisfaction in the damages, though the assault and battery be committed by several, and though the action be brought either jointly or severally: 11 *Co.* 67.; *Cro. J.* 118: *ante*, 96, as to judgment recovered, and *post*, that title. As to the proof of admissions by co-trespassers, *vide ante*, 52. Where there has been a *maihem* or wounding, the court may, upon view, increase the damages: *Cooke v. Beal*, 1 *Ld. Raym.* 176, \*3 *Salk.* 115, *s. c.* But upon a mo- [\*106] tion to increase the damages *super visum vulneris*, it should be proved to be the same wound for which the damages were given, but the court will not allow fresh evidence to be adduced: *B. N. P.* 21. On a view of the party and examination of the surgeon *ore tenus* in court, the damages were increased from £11 14s. to £50: *Burton v. Baynes*, *Barn.* 153. But, where the judge who tries the cause is satisfied with the verdict, the court will not increase the damages: *Brown v. Seymour*, 1 *Wils.* 5.

### *Evidence for Defendant.*

When there is no plea of the general issue, deft. having admitted the facts stated in the declaration, usually begins, and in such case he is entitled to the general reply.

*General Issue.*] Under this plea deft. may give in evidence any matter denying the facts stated in the pleadings, showing he was not the trespasser, and that no assault was committed. Matters of excuse, as we have seen, may be given in evidence under this plea, but not matters in justification, which must be specially pleaded, unless in some actions against justices of the peace and other public officers: see "*Justices of Peace*," "*Officer*," &c.: as, by proving what was said at the time, to show the intention or object of the parties, for every thing which passes at the time is part of the transaction on which the plt.'s action is founded: *B. N. P.* 17. Deft. may extract this evidence by the cross-examination of witnesses: *Moore v. Adam*, 2 *Chit. Rep.* 198. Where, in an action for an assault and battery, and not guilty pleaded, evidence was offered that the battery was given by way of punishment for misbehaviour on board the ship of which the deft. was captain, and it was insisted that the conduct of the deft., at the time of the assault, being necessarily in evidence, proved that misbehaviour, *Lord Eldon, C. J.*, was of opinion, that as there was no justification pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted.

ed; and the Court of Common Pleas were of opinion that this direction was right: *Watson v. Christie*, 2 B. & P. 224. In an action of trespass for an assault which took place amongst the multitude, the court granted a rule that plt. should disclose his place of residence and occupation to the defts.: *Johnson v. Birley*, 5 B. & A. 540, 1 D. & R. 174, s. c.

*Plaintiff's first Assault.*] Under this plea, deft. will be bound to show that plt. committed the first assault, and that it was such as to require the deft.'s self-defence, and the consequent assault on plt. The law will permit any degree of violence to be justified, if it be necessary for the safety of the deft.: *Cockcroft v. Smith*, Salk. 642; 1 Ins. 282, b. 283, a. However, every assault will not justify every battery; and it is matter of evidence whether the assault were proportionable to the battery; and so, though *son assault* is a good plea in maihem, it must appear that the assault was in some degree proportionable to the maihem: *ib. B. N. P.* 18; 1 Sid. 246. If *son assault demesne* be pleaded without the general issue, and the declaration confines the plt. to the proof of one assault only, *ante*, 104, the deft. may prove the plt.'s assault on him to have taken place at any day before the action brought, and is not confined to that laid in the declaration; and, if the plaintiff cannot answer the assault of that day, he will have a verdict against him, for he is not allowed to go into evidence of an assault or battery at another day or place, 1 *Esp. Dig.* 340; but this is not the case where the declaration comprises more than one assault, or when the general issue is pleaded with the justification of *son assault*, for then the deft. is bound to justify the assault proved: *Brownl.* 233.

*Moderate Correction.*] \*A justification on the ground of moderate correction of a servant or apprentice, &c., must be proved by evidence, [\*107] though plaintiff is such servant or apprentice. If there be any written contract of hiring between plt. and deft., the same should be produced, and proved in the usual way; if not, the plt.'s retainer must be proved by other means. If the justification be against an apprentice, the indenture of apprenticeship should be produced and proved. Evidence of the plt.'s faults must be adduced, which must be sufficient to warrant the assault in question. In an action at the suit of a seaman for an assault, which deft. justified on account of disobedience, &c., if plt. was found guilty of it by a court martial, the sentence should be fully proved as well as pleaded, as an estoppel against plt.'s disputing the fact of disobedience, &c.: *Hannaford v. Hunn*, 2 C. & P. 148.

*Defence of Relative, Servant, &c.*] The facts of relationship or service must be proved; see *post*, title "*Seduction*." Also, that deft.'s interference was necessary for deft. See evidence, *supra*, under "*Self-Defence*," 106.

*To Preserve the Peace.*] The facts stated in the plea must be fully proved, especially that the king's peace was then being broken, or about to be so.

*Defence of Possession.*] The burden of the proof under this plea lies on deft., who must prove all the facts stated in his special plea, sufficient to justify the assault. Deft. should show he was possessed of the premises in question, as by carrying on business, or living in the house: *Cro. Car.* 138. There does not appear any necessity for deft. to prove the title to the premises, though indeed this is disputed, *ib.* The deft. should prove that the plt. came into his premises either without his license, and upon no lawful occasion, or though for a lawful occasion, as into an inn, that, when there, he misconducted himself; and, upon being requested to depart, and plt.'s refusal or use of resistance or violence, deft. was obliged to use force to compel him so to do: *Williams v. Jones*, 2 Str. 1049; *Green v. Goddard*, 2 Salk. 641; *Com. D. Plead-er*, 3 M. 16; *Gregory v. Hill*, 8 T. R. 299; *Esp. Ev.* 262; [*Green v. Bartram*, 4 Carr. & Payne, 308.] If plt. has no right to be on premises, proof of a request to depart will suffice, without any other proof of plt.'s misconduct. If plt. attempt to enter deft.'s premises by force, proof of that fact supersedes the necessity of proving a request to depart: *Weaver v. Bush*, 8 T. R. 78. If deft. justifies as a servant, he must also prove that he was such servant, and in actual service at the time, and that his conduct was in discharge of his duty. See "*Master and Servant.*"

*Special Replication.*] Under a special replication, all the preceding facts stated in the pleadings are admitted. The burden of supporting it lies on the plt., but deft. should be prepared to rebut it. See evidence under justification for imprisonment, and *post*, "*False Imprisonment.*" As to evidence in reduction of damages, *supra*.

*Competency of Witness:* *post*, "*Witness,*" *ante*, "*Admissions.*"



## ASSIGNEES.

See *Bankrupts*, "*COVENANT.*"



## ASSUMPSIT.

[\*108]

### WHEN THE PROPER FORM OF REMEDY:

*its nature, and when it lies in general*, 109.

*when the only Remedy*, *ib.*

*when sustainable, where a higher security given*, 110.

*when sustainable, though Deft. guilty of a Tort*, 111.

### FORM OF PLEADINGS IN:

*Declaration*, 111 to 138.

*in general*, 112.

## I. SPECIAL COUNTS, STATING: 111 to 136.

*Inducement*, 112.*Consideration*, 114 to 116.*Contract or Promise*, 116 to 121.*Performance of Condition Precedent, or Excuse*,  
121 to 130.*Request*, 130.*Notice*, 132.*Breach*, 133 to 136.*Damages*, 136.

## II. COMMON COUNTS: 136 to 138.

*Plea*, 138.*when to plead specially*, *ib.**Form of Plea*, 139.*Replication, &c. ib.*

## PRECEDENTS IN:

*Commencement and Conclusion of Declaration*, 139.*Common Indebitatus Count*, *ib.**Quantum Meruit Count*, *ib.**Quantum Valebant Count*, 140.*Plea of General Issue*, *ib.*

## EVIDENCE FOR PLAINTIFF: 140 to 153.

*under GENERAL ISSUE*, 140 to 152.*Inducement*, 140.*Contract Itself*, 141.*that it was made with Plaintiff*, 142 to 145.*that it was made by Defendant*, 145 to 146.*Consideration*, 146.*Performance of Condition Precedent, &c.*, 149.*Notice or Request*, *ib.**Breach*, *ib.**Damages*, *ib.**under SPECIAL PLEA OR DEFENCE*, 153.

## EVIDENCE FOR DEFENDANT: 153 to 155.

*Defences in general*, 153.*Reduction of Damages*, *ib.*

[\*109]

\* *When the proper Form of Remedy.*

*Its Nature, and when it lies in general.]* Assumpsit lies for the recovery of damages for the breach of simple contracts or promises; and

this, whether the contract or promise be express or implied, as the law always raises an obligation to do that which a party is legally liable to perform: *Step. Pl.* 16; *Lamb v. Bunce*, 4 *M. & S.* 275. It cannot be supported unless there be such contract or promise. Particular instances as to when this action lies will be found in this work, when treating on the form of remedy under each title. As a general rule, it should be observed, that promises are, 1, to pay or repay money; or, 2, to do or forbear some other act: *Step. Pl.* 12, 16.

The first class occurs both in common and special assumpsits. In common assumpsits they are the *indebitatus assumpsits*: 1st. On a promise to pay a precedent debt for the sale, assignment, or use of lands, &c., the sale, exchange, or hire of cattle or goods, necessities, or works and services; 2nd. The *quantum meruit* or *valebant* on a promise to to pay the plt. for the like considerations as much money as he deserved to have, or for his goods, &c. so much as they were reasonably worth; and, 3d. on the *insimul computassent*, on a promise to pay the sum due on an account stated. In special assumpsits they arise on a promise to pay money, in consideration of a legal liability to pay it, as upon a bill of exchange, foreign or inland, banker's draft, promissory note, by-law, or foreign judgment, or for a fine on admission to copyhold premises, legacy charged on land, toll, post-duty, contribution to party-walls. 2. On mutual promises either to pay money, as on wagers, or feigned issues; or to do some other act, as to marry, &c.; or to perform particular agreements, charter-parties, policies of assurance, or awards; the breach of which may consist either in the non-payment of money or non-performance of some other act: 3. On promises to pay money on considerations executed or executory; as in consideration of marriage, the sale, assignment, or use of lands, &c., tithes, the sale or exchange or hire of cattle or goods, necessities, forbearance, works and services, or indemnity, which promises may be made either by the party benefited, or by third persons. Promises to repay money are either express or implied; the latter may be given in evidence under the common count for money had and received: *Tidd*, 23.

The second class occur only in special assumpsits, and are on promises to do or forbear some other act, as,—1. To sell, assign, or exchange lands, &c.; or, by or against landlord or tenant, to take, let, hold, repair, cultivate, or quit them: 2. Upon a sale or exchange of goods or cattle, to accept, deliver, take back, or return them; or upon a warranty as to their title, quality, or value: 3. Upon a bailment of goods or cattle to be kept, either generally or by way of pledge, concerning goods or cattle lent or let to hire; or against carriers, wharfingers, farriers, &c.: 4. To provide necessities for plt. or for third persons: 5. To forbear to sue or give time for the payment of a debt: 6. To perform works, under which may be classed promises made by professional persons, as attorneys, surgeons, &c.; or respecting real or personal property: 7. Upon a retainer to serve or employ: 8. Respecting real or personal securities: 9. To account for the profits of lands, or for money or goods: 10. On promises of indemnity: *Tidd*, 2, 3.

*When the only Remedy.]* There are some cases in which assumpsit

is alone maintainable. Thus it is said to be the only remedy against executors and administrators for the breach of a simple contract, *Barry v. Robinson*, 1 N. R. 293; or for the recovery of money payable by instalments, where the whole debt is not due, *Rudder v. Price*, [\*110] 1 H. B. 550, 2 Saund. \*303, n. 6, *Cooke v. Whorwood*, ib. 337, *Peters v. Opie*, ib. 350; or on a guarantee, *Hard*. 486, 2 Saund. 62, b. See "*Bills Exchange*," "*Award*."

[When sustainable where Plaintiff has a higher Security.] Assumpsit cannot, in general, be supported where a higher security has been given, either by instrument under seal or by record, as the simple contract on which alone assumpsit is sustainable is generally merged in such higher security: *Acton v. Symond*, Cro. C. 415; *Twopenny v. Young*, 3 B. & C. 211, *Bac. Ab. Debt, G., &c.*; *Toussaint v. Martinnant*, 2 T. R. 104; *Drake v. Mitchell & or.*, 3 East, 259; *Schleneker v. Moxsy*, 3 B. & C. 792, 1 Chit. Pl. 91; *Schack v. Anthony*, 1 M. & S. 575; *Leslie v. Wilson*, 6 Moore, 425, n. post, "*Charter-party*," "*Freight*." But the party may proceed in assumpsit on the original contract, and frequently on an implied contract, if the deed be *inoperative or void*; as from usury, 1 Saund. 295, a.; or under the Annuity Act, &c., *Surfield v. Gowland*, 6 East, 241; or from infancy, *B. N. P.* 182; or where there is a written contract relating to the matter, which cannot be read for want of a stamp: *Fielder v. Ray*, 4 Carr. & Payne, 61; or where a bankrupt gives a bond in satisfaction of a simple contract debt, after a secret act of bankruptcy: *Ambrose v. Clendon*, 2 Str. 1042. And assumpsit will lie where there has been a new contract, in respect of a new consideration to pay a debt or perform a contract under seal, *White v. Parkin*, 12 East, 578: as, on a promise to pay an assignee of a bond in consideration of forbearance, 1 Saund. 210, n. 1; or by a debtor in respect of any new consideration, *Brett v. Read*, Cro. Car. 343, Cro. El. 67; or by a third person, *anon. Cowp.* 129; or on a promise to the husband to pay the arrears of a rent charge, due to the wife in her lifetime, though the rent was secured by deed: *anon.* 1 Leon, 293, cited in *Moorson v. Kymer*, 2 M. & S. 309. So, on a balance between partners, if one expressly promise to pay it, assumpsit lies, though they have covenanted to account, *Foster v. Allanson*, 2 T. R. 483; *White v. Parkin*, cited in 12 East, 582. And assumpsit lies where a simple contract has been substituted for a contract under seal, after the breach of the covenants therein, *Heard v. Wadham*, 1 East, 636, *Innes v. Dunlop*, 8 T. R. 595, *Burn v. Miller*, 4 Taunt. 748; and so where several things unconnected with the deed are included in the new contract: *Schack v. Anthony*, 1 M. & S. 575; *Foster v. Allanson*, 2 T. R. 479; *Davis v. Morgan*, 4 B. & C. 8; 6 D. & R. 42. And if the binding be not mutual, as, where parties contract by deed, and plt. signs, but the deft. does not execute the deed, it will be no bar, but he may sue in assumpsit: *Sutherland v. Lishnan*, 3 Esp. Rep. 42. And assumpsit lies for use and occupation of a house, though there be an agreement by deed of lease; but it does not amount to an actual demise: *Elliot v. Rogers*, 4 Esp. Rep. 59. And assumpsit will lie on an implied contract where the deed is invalid, if there be sufficient evidence to imply a promise: as, where a husband covenanted with a trustee to pay his wife a certain separate

allowance, but neglected payment, it has been held, that the trustee may recover in assumpsit for necessities supplied on the common law obligation, *Nurse v. Craig*, 2 N. R. 148, *Mansfield, C. J., dissent.*; as he thought "the specific covenant excluded a ground in law for supporting an assumpsit on the presumed assent of the husband," *ib.* 160: as, where an annuity has been set aside for a defect in the memorial, *Waters v. Mansell*, 3 Taunt. 56; and, where a *feme covert* contracted with a servant by deed, but without authority from the husband, it was held the law would imply a contract on the part of the husband to pay the servant for the work done: *White v. Cuyler*, 6 T. R. 176. Assumpsit lies on the simple contract, though a deed be given as a *collateral security*. Therefore, where B., being indebted to A., procured C. to join with him in giving a joint and several promissory note for the amount, and afterwards, having become further indebted, and being pressed by A. for further security by deed (reciting the debt and the note, and that a further security had been offered), assigned to A. all his goods as a further security, with a proviso, \*that he should not be deprived [\*111] of the possession of the property assigned until after notice; it was held that the deed did not deprive A. of his remedy against C. on the note: *Twopenny v. Young*, 3 B. & C. 208; 5 D. & R. 259. Assumpsit sometimes lies for moneys accruing, due under the provisions of a statute, 1 Saund. 37, B. N. P. 129, *Rann v. Green*, Cowp. 474, post, "Statute;" and, as to when it lies on a judgment, post, "Judgment."

*When Sustainable, though Defendant guilty of a Tort.]* Assumpsit will lie for a nonfeasance, misfeasance, or malfeasance, *Samuel v. Judin*, 6 East, 335; for, where deft. has been guilty of tortious neglect of his duty, plt. may waive the tort, and rely on the circumstances, as forming a breach of promise, implied from some consideration of reward, &c.: *Govett v. Radnidge*, 3 East, 70; *Edmeads v. Newman*, 1 B. & C. 418, 423; 2 D. & R. 568; *Morgan v. Palmer*, 2 B. & C. 735, 6; 4 D. & R. 283. Therefore, assumpsit lies for goods, which the deft. had, by fraud, procured the plt. to sell to an insolvent, and which the deft. had got into his own possession; for he could not set up the sale, because his own fraud had procured it; and the mere possession, unaccounted for, is sufficient to raise an assumpsit: *Hill v. Perrott*, 3 Taunt. 274; post, "Money Had and Received." Where there is no certain duty or contract, express or implied, arising from the circumstances of the tort, *Mayor of Northampton v. Ward*, 1 Wils. 107, 9, and therefore, where the possession is adverse, assumpsit will not lie for use and occupation, but plt. must declare in ejectment or trespass: *Birch v. Wright*, 1 T. R. 378, 387. So, where deft. enters plt.'s close or market, and erects a stall without license, assumpsit will not lie: trespass is the proper remedy: *Mayor of Northampton v. Ward*, 1 Wils. 109. And, where cattle are taken *damage feasant*, and money paid for their release, assumpsit cannot be supported to recover it, but trover, trespass, or replevin, are the proper forms: *Lindon v. Hooper*, Cowp. 415; *Shipwick v. Blanchard*, 6 T. R. 298. And, in case of deceit, where there is a written contract, and it is apparent on the face of it, assumpsit will not lie, but the party must bring case for the deceit-



ful representation: *Meyer v. Everth*, 4 *Camp.* 22. We have seen that the plt. may, in some cases, waive the tort or trespass, and declare in *assumpsit* for money had and received, or even for the work and labour of his apprentice: *ante*, 92. If a tenant hold over, his landlord may treat him as his tenant, *Burchell v. Hornsby*, 1 *Camp.* 360, *Right v. Darby*, 1 *T. R.* 162; and *assumpsit* lies for goods as sold against a deft., who by fraud procured the plt. to sell to an insolvent goods which the plt. got into his possession: *Hill v. Perrott*, 3 *Taunt.* 274; but see *Read v. Hutchinson*, 3 *Camp.* 350; and so it lies to recover rents tortiously received: *Boyster v. Dodsworth*, 6 *T. R.* 683; *B. N. P.* 133, *a.*

As to when *assumpsit* is the most advisable form of remedy, *post*, "Case."

### *Form of Pleadings.*

With respect to the title of the count and term, the venue and usual commencement of declarations, *post*, "Declaration."

The declaration in this action must invariably disclose the consideration upon which the contract was founded; the contract itself, whether express or implied, and the breach thereof, and damages, *Bac. Ab. Assumpsit, F.*, and whether the contract be express or implied, or in writing, or by parol, the declaration is in general the same; always stating a specific contract, which may be proved in evidence, by showing a contract, either express or implied: *Lawes, Pl.* 28.

I. SPECIAL COUNTS.] The form of the declaration is either special or common. It must be *special* where the contract is founded [\*112] on a consideration \*which remains executory, or on a consideration of legal liability, without an express promise, or on a consideration of mutual promises, or on a contract to do or forbear an act, which is not to pay or repay money, or the value of chattels. It cannot be *common* but where the debt lies, and where the contract was to pay or repay money, or the value of chattels, and the consideration is executed, and not merely executory, and not upon mutual promises; *Hard's Case*, 1 *Salk.* 28, *Fowke v. Pinsacke*, 2 *Lev.* 152, *Carth.* 276, *Solly v. Weiss*, 2 *Moo.* 420, *Studdy v. Sanders*, 5 *B. & C.* 638, *E. of Falmouth v. Penrose*, 6 *B. & C.* 385: see further, as to instances when plt. may recover under the common counts, *post*, "Vendor and Purchaser," "Goods Sold," "Work and Labour," "Money Lent," "Money Paid," "Money Had and Received," "Interest," and *ante*, "Account Stated." When the plt. can declare specially, it is frequently advisable so to do, as he may thereby avoid a plea of set-off, or tender, &c.: *Cotson v. Welsh*, 1 *Esp. Rep.* 380; *Eland v. Carr*, 1 *East*, 375; *Fair v. M'Iver*, 16 *East*, 136; *Cornforth v. Rivett*, 2 *M. & S.* 510, *post*.

INDUCEMENT.] In the statement of a special contract, it is frequently necessary, where the terms of the contract are ambiguous, to explain the same by a prefatory statement, which is called *inducement*. The mat-

ter of such inducement may, indeed, be stated in any part of the declaration, but it will be found most advisable to state it preparatory to the contract itself or any other matter: 1 *Chit. Pl.* 260. Thus, in assumpsit for not performing an award, the declaration states that there were differences between the parties, before it states the submission and promise to perform the award: *post*, "Award." So, in assumpsit by an under-lessee against his lessor, for the amount of ground-rent he has been obliged to pay to the head landlord, the deft.'s tenancy should be stated in order to render the subsequent statement of the cause of action intelligible: *Moore v. Pyrke*, 11 *East*, 52; *Brown v. Crump*, 1 *Marsh*, 567. And so, on a contract to pay money upon a consideration of forbearance, the debt forborne and proceedings stayed should be stated: *Tidd*, 438; *Jones v. Ashburnham*, 4 *East*, 455; *Marshall v. Bucken-shaw*, 1 *N. R.* 172. So, in actions against persons whose character or situations create certain liabilities, as actions against wharfingers, carriers, coach-owners, captains of ships, it is usual, and, in some cases, necessary to state that they were employed in those characters, by way of inducement: *Powell v. Layton*, 2 *N. R.* 365; *Max v. Roberts*, 12 *East*, 94.

When the consideration and promise explain themselves without reference to any collateral matter, no inducement need be stated, as in actions on policies of insurance, bills of exchange, foreign judgments, &c. In an action against an attorney for negligence, the declaration may be without any inducement, and may commence with the statement of the deft.'s retainer, without stating any consideration: *Bourne v. Diggles*, 2 *Chit. Rep.* 311; *Elsee v. Gatward*, 5 *T. R.* 143; *Green v. Jackson*, *Pea. Rep.* 237; *Knights v. Quarles*, 4 *Moo.* 532.

Mere matter of inducement need not be stated with that precision and certainty as matter which constitutes the true substance or gist of the action itself. But it must be stated with a certainty sufficient to explain the contract, and certainty to a common extent is enough, especially if it be matter of an executed or past consideration: 1 *Chit. Pl.* 261; *Com. D. Pleader*, C. 31, 43, E. 10, 18; *Coze v. Jennings*, *Yelv.* 17. Thus, where an agreement with a third person is stated only as inducement to the deft.'s promise, which is the gist of the action, it is sufficient to state such agreement, without certainty of name, place, or person: *ib.* So, in declaring on a promise to pay money, in consideration of the forbearance of a preceding debt, though some cause of action must be alleged, it is not necessary to state the particular cause or subject-matter of the debt, or the time when, or place where, it was contracted: *Hob.* 18. In an action \*against a carrier for the loss [\*113] of goods, the usual inducement as to the delivery of the goods to him, need not contain an exact description of such goods: 2 *Saund.* 74, a. In declaring on a parol submission to an award, it does not seem necessary to state the cause of dispute: 2 *Saund.* 61 h, n. 1.

The matter of the inducement should be stated in the substance, according to the legal effect, and substantially agree with the facts of the case. It should not be stated merely as a matter of description, for fear of a variance, as it is a rule that allegations of substance must be substantially proved, but allegations of description literally so: *Stoddart v.*

*Palmer*, 3 B. & C. 4; 4 D. & R. 624, s. c. Where, in a declaration to recover from the deft. the balance of a bill due from a third person in consideration of forbearance, and the balance was stated, under an inducement, to be £26. 13s. 6d., when, in fact, it was only £26., it was held a variance: *Bray v. Freeman*, 2 Moo. 114; 8 Taunt. 197. s. c. Where, in assumpsit for not indemnifying plt., in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in *Michaelmas Term*, 58 G. 3., recovered of plt., the judgment given in evidence was in *Hilary Term*, it was held this was no variance, as it was not matter of description, but an allegation in substance, that the judgment had been obtained before the commencement of the action: *Phillips v. Shaw*, 4 B. & A. 435; and see *Stoddart v. Palmer*, 3 B. & C. 2; 4 D. & R. 624, s. c.; *post*, "Case." On the other hand, in an action on a promise to pay the costs of an action, in consideration of plt.'s staying the proceedings therein, the court in which the action was depending must be accurately described: *Impey v. Taylor*, 9 M. & S. 166.

If the inducement be so stated as to constitute a part of the contract itself, it must be proved strictly, in the same way as the contract should be proved: so, where the price of goods was stated in matter of inducement, and the declaration afterwards, stating the contract itself, and the price of those goods, referred to the price stated in the inducement, which was not the real one, it was held a fatal variance: *Andrews v. Whitehead*, 13 East, 102.

In all cases, care should be taken not to insert any more than is absolutely necessary; for, though an immaterial averment, which is wholly impertinent, and may be rejected as surplusage, need not be proved, *Winn v. White*, 2 W. Bla. R. 840, *Bristow v. Wright*, Dougl. 667, yet if it, by the statement, becomes relevant to the action, or is so mixed up with a material averment, that it cannot be readily separated therefrom, and rejected as surplusage, the plt. will be compelled to prove it *substantially*; and, if it be stated as matter of *description*, he will be bound to prove it *literally*: see 1 Chit. Pl. 261, *Stoddart v. Palmer*, 3 B. & C. 4, 4 D. & R. 624; see further, as to what is a variance, *post*, and the different titles. Thus, in an action against an attorney for negligence, in not proceeding to judgment in due time against a prisoner, whereby she escaped, and the declaration averred that such prisoner *was indebted to plt.* on promises, &c., and that plt. retained deft. for the recovery of the debt, but it appeared on the trial that the averment was not true, as it was proved that the prisoner was a married woman, and therefore was incapable of contracting a debt, the plt. was nonsuited; though had the declaration been formed to meet the question, plt. might perhaps have recovered: *Lee v. Ayrton*, Pea. Rep. 119; *Gunter v. Cleyton*, 2 Lev. 85; *Alexander v. Macauley*, 4 T. R. 611. In an action against a person in a particular character, it is sufficient to state generally that he was employed in such character; as, in an action against an attorney, plt. should only state that *he was retained or employed* as such, and not that *he was* one of the court: *Green v. Jackson*, Pea. Rep. 236; *Else v. Gatward*, 5 T. R. 143; *Shiells v. Blackburne*, 1 H. Bl. 161; *Bourne v. Diggles*, 2 Chit. R. 312; *Berryman*

*v. Wise*, 4 *T. R.* 366; *Smith v. Taylor*, 1 *N. R.* 196; *Rex v. Crossley*, \*2 *Esp. Rep.* 526. Where the plt. alleged, in an action for not completing the purchase of certain shares, that he was lawfully entitled to so many shares, and it appeared, from the act of Parliament which created the shares, that no legal title had been vested in him, it was held a ground of nonsuit: *Latham v. Barber*, 6 *T. R.* 67. Only such matter as is strictly necessary, and capable of proof, should be stated, as all material allegations of matter of description must be literally proved: 3 *B. & C.* 4.

Immaterial averments, which may be rejected as surplusage, unless of matter of description, are not put in issue, and need not be proved: *Peppin v. Solomons*, 5 *T. R.* 498; 2 *W. Bl. Rep.* 840. A wrong averment of title, when the estate of the plt. is not a material averment, will not vitiate: *Winn v. White*, 2 *W. Bl. Rep.* 840.

**The CONSIDERATION.]** The plt. may aver a legal and sufficient motive, inducement, or consideration, in order to support the contract on which the action is founded: *Com. D. Action, Assumpsit*, *H.* 3; *Mitchinson v. Hewson*, 7 *T. R.* 348; 2 *B. & P.* 79. In actions upon foreign judgments, bills of exchange, &c., it suffices merely to state the liability, from which a sufficient consideration is implied: *Bishop v. Young*, 2 *B. & P.* 79, *Remington v. Taylor*, *Lutw.* 237; and it may suffice to show a mere moral obligation: *ib.*; *Gibbs v. Merrill*, 3 *Taunt.* 311. In an action of assumpsit for a mere misfeasance, a consideration need not, in general, be alleged; therefore, where it is stated that the plt., being possessed of some old materials, retained the debt, to perform the the carpenter's work on certain buildings of the plt., and to use those old materials, but that the debt, instead of using those, made use of new ones, thereby increasing the expense, will be sufficient: *Elsee v. Gatward*, 5 *T. R.* 143.

It must be shown that the consideration on which the promise is founded, arose from the debt's request, or that which is equivalent to it, *Bourne v. Mason*, 1 *Vent.* 6, *Dutton v. Pool*, *ib.* 318, 332, *Crow v. Rogers*, 1 *Str.* 592, though it will sometimes be implied in evidence: 1 *Saund.* 264, note c. Thus, a subsequent request will be implied, where a duty results from a previous contract; as, if a carrier assent to carry goods, plt. may declare on an executed consideration of having delivered the goods to be carried: *Streeter v. Horlock*, 7 *Moo.* 283; 1 *Bing.* 34, s. c. The consideration must not be stated to have been done at the instance of the plt. himself: *Sty.* 465; 1 *Saund.* 264, a. The statement of the consideration having arose at debt's request, will frequently, after verdict, cure a defective statement of a consideration: *Shiells v. Blackburn*, 1 *H. Bla.* 158; *Whitehead v. Greetham*, *M. & Y.* 205; 2 *Bing.* 464, s. c. *Dartnall v. Howard*, 4 *B. & C.* 345; post, "Common Counts."

The consideration must, on the face of the declaration, appear sufficient and legal to support the contract as laid; otherwise, even a verdict will not cure the defect: *Jones v. Ashburnham*, 4 *East*, 464; *Mitchinson v. Hewson*, 7 *T. R.* 348. No mode of pleading can enable the plt. to recover on an illegal contract: *Featherstone v. Hutchinson*, *Cro. El.* 200; *Sir T. Jones*, 24.

The consideration may be stated in its very terms, or according to its legal effect; and a variance will be fatal at the trial; *Jones v. Ashburnham*, 4 East, 464; *King v. Robinson*, Cro. El. 79; *Symmons v. Knox*, 3 T. R. 67. Where the declaration alleged the consideration to be certain reasonable reward, and it was proved that a particular sum was agreed on, it was held no variance: *Semb. p. Chambre, J., Bayley v. Tucker*, 2 N. R. 458; and see *Laing v. Fidgeon*, 6 Taunt. 108.

On the other hand, where the declaration stated the consideration to be the purchase of sheep for £54 11s. 6d., and the price proved was £54 12s. 6d., the plaintiff was nonsuited for the variance: *Symmons v. Knox*, 3 T. R. 67. So, where the consideration stated was the forbearance of payment of £21 16s., and the sum proved was £21 18s., [\*115] it was holden a \*fatal variance, *Arnfield v. Bate*, 3 M. & S. 173; and an allegation of a retainer "at a certain salary, to wit, £250 per annum," can be supported only by proof of a contract for a specific annual salary: *Preston v. Butcher*, 1 Stark. 3.

The whole of the consideration must be stated, or there will be a ground of nonsuit: *Symmons v. Knox*, 3 T. R. 67; *King v. Robinson*, Cro. El. 79. If it be stated that deft. promised, in consideration of one thing, and it appear that it was made in consideration of that thing and another, the action must fail, *ib.*; or if the promise be grounded on two considerations, and plt. declare on one: 1 Leon. 300; *Simms v. Westcott*, Cro. El. 147. And, if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plt. will fail on the trial; but, if a contract consists of several distinct parts and collateral provisions, it is sufficient to state so much of the contract as contains the entire consideration and the entire act to be done in virtue of such contract: *per Ld. Ellen., Clarke v. Gray*, 6 East, 569; *Miles v. Sheward*, 8 ib. 6; *Leeds v. Burrows*, 12 ib. 1; *Andrews v. Whitehead*, 13 ib. 102; *Symonds v. Carr*, 1 Camp. 362. Where the contract is that plt. should execute an assignment of a bill, on the condition that, if the deft. should receive any dividends upon the bill, he should pay them over to the plt., the declaration should state the consideration to be, that plt. had assigned to deft. the legal interest in the bill, subject to such condition; and, if he alleges an unconditional assignment, it will be a fatal variance: *Vansandau v. Burt*, 5 B. & A. 44. In assumpsit by a landlord against the assignees of a bankrupt, on an agreement to pay 10s. in the pound for rent due from the bankrupt and themselves, it appeared that part of the consideration was, that the plt. should accept a surrender, which consideration being omitted, the plt. was nonsuited: *Man. Index*, 308. So, a declaration on a warranty, upon a consideration that plt. would buy a horse at a certain price, to wit, £86 5s. is not supported by evidence of a warranty upon the purchase of two horses jointly for the sum of sixty guineas: 2 Stark. Ev. 86. But, if the consideration omitted do not form in substance a part of the contract, it is immaterial; and, therefore, where a declaration in debt for rent stated of a message, &c., and the proof was of a demise of a message, &c., together with the furniture, utensils, and implements, it was held that, as the rent issued out of the property, and not out of the furniture, it was sufficient for the plt. to allege and prove a demise of the real property, and therefore there was no variance: *Farewell v.*

*Dickenson*, 6 B. & C. 251. Where part of the consideration, or one of several considerations, is frivolous and void, it is sufficient to state only the valid consideration, though, if stated, it will not vitiate the declaration: *Featherstone v. Hutchinson*, Cro. El. 149; *Coulston v. Carr*, ib. 848, 1 Sid. 38, B. N. P. 147, 1 Chit. Pl. 263. But no mode of pleading can enable the plt. to recover where part of an executory consideration was illegal: *Cro. El.* 200; *Sir T. Jones*, 24; 1 Sid. 66. n, 1.

It is generally convenient to state the facts concisely, and then to aver that, "in consideration thereof, &c.," or "of the premises," when it relates to several, "the deft. promised, &c.;" the omission of these words will be cured by verdict: *Sturlyn v. Albany*, Cro. El. 67. The allegations, however, that deft. promised, *in consideration*, &c. must be certain and specific, 3 Leon. 129; but alleging that, in consideration of plt.'s promise to perform his part of the agreement, the deft. promised to perform his, is sufficient: *Hardres*, 103.

If the consideration be *executory*, or for something still to be done, the declaration should contain the time and place when and where it arose, and it ought to be averred when and where it was performed and executed: *Sexton v. Miles*, 1 Salk. 22. As, in an action for wages, in consideration that plt. would proceed on a certain voyage, the voyage agreed on must be stated, though it had been determined by the captain, which fact must also be averred: *White v. Wilson*, 2 [\*116] B. & P. 116, 120; *Ward v. Harris*, ib. 265, 1 Saund. 320.

And so, in assumpsit for not delivering goods, the specific sum or price agreed on must be stated, for the measure of damages being the difference between the price agreed on and their actual value, it could not be otherwise ascertained: *Andrews v. Whitehead*, 13 East, 102. But, in an action against a carrier for the loss of goods, stating that deft. undertook to carry them in consideration of "certain reward," is sufficient, without stating what reward: ib. 114, n. a.; *Bayley v. Tucker*, 2 N. R. 458. And, in the case of an executed promise, or something already done, less certainty is necessary, and plt. need not state time or place, or that it was performed or executed; for the promise, and not the performance of the thing itself, is, in such case, the consideration: *Andrews v. Whitehead*, 13 East, 105, 16, 17; *Streeter v. Horlock*, 1 Bing. 34, 7 Moo. 283, s. c. But, even in stating an executed consideration, a statement that in consideration that the plt. had sold to the deft. a "certain horse" of the said plt., "at and for a certain quantity of oil," to be delivered in "a certain time," which had elapsed, is bad on special demurrer: *Ward v. Harris*, 2 B. & P. 265. It must be shown that the executed consideration arose at the request of deft.: 1 Saund. 264, n. 1; 1 Chit. Pl. 264. It is always advisable, when the facts will meet it, to declare on an executed consideration. In the case of a *concurrent* consideration, which is founded on mutual promises, such promises must be concurrent or obligatory on both parties at the same time, and must be so stated in pleading: *Cooke v. Oxley*, 3 T. R. 653; *Clayton v. Jennings*, 2 W. Bla. R. 706; *Wain v. Warlters*, 5 East, 16. And plt. cannot, in general, support his action without averring performance on his part, or some act equivalent to it, as readiness to perform it, or the like: *Morton v. Lamb*, 7 T. R. 125; *Smith v. Wood-*

house, 2 N. R. 233; *Jones v. Barkley*, Doug. 684. As, upon contracts to sell and accept goods, *Rawson v. Johnson*, 1 East, 203. *Waterhouse v. Skinner*, 2 B. & P. 447; or upon promises to marry, 1 Saund. 320, d. n. 5. Where an agreement has been stated, it does not seem necessary to state the mutual promises: *Mountford v. Horton*, 2 N. R. 62; *Radenhurst v. Bates*, 3 Bing. 470. It is not necessary to aver performance of the things stipulated to be done, where the plt.'s undertaking is itself the consideration: *Martindale v. Fisher*, 1 Wils. 88. See further, *post*, 121, "*Averment of Performance*." Where plt. describes a continuing consideration, he must allege the continuance of it, and a non-performance on the part of the deft. during its continuance: *Powley v. Walker*, 5 T. R. 373; *Winn v. White*, 2 W. Bla. R. 842; *Mussen v. Price*, 4 East, 150.

When plt. states no legal consideration: as, where it is entirely insufficient or void from illegality, it is objectionable on demurrer. *Clipsam v. Morris*, 1 Vent. 9, *Jones v. Ashburnham*, 4 East, 455; in arrest of judgment, *Dartnall v. Howard*, 4 B. & C. 345, 6 D. & R. 438; or writ of error, *Whitehead v. Greetham*, 2 Bing. 464, *Witchenson v. Hewson*, 7 T. R. 348. But, if merely alleged insufficiently, it should be objected to by demurrer or in arrest of judgment: 2 Bing. 468; 4 B. & C. 345. And, where it is untruly stated, it will be a ground of nonsuit as a variance: *King v. Robinson*, Cro. El. 79; *Miles v. Sheward*, 8 East, 7. And an uncertain or informal statement of the consideration is cured by verdict: *Sty.* 304; *Jones v. Ashburnham*, 4 East, 464; *Ward v. Herries*, 2 B. & P. 265.

*The CONTRACT or PROMISE.*] The deft.'s contract or promise must be stated, for the law will not, in general, create a contract or promise in pleading, *Ninan v. Bland*, 3 Smith, 114, *Morris v. Norfolk*, 1 Taunt. 217; and the omission may be taken advantage of in arrest of judgment, *Buckler v. Angil*, 1 Lev. 164, 1 Sid. 246, s. c.; or on a writ of error, *Lea v. Welch*, 2 Ld. Raym. 1516, 2 Str. 793, s. c. But, where the declaration stated that, "in consideration thereof, undertook [\*117] and promised," omitting "to say, deft. "undertook," &c., it was held immaterial, after judgment by default: *Shore v. Brown*, 1 Salk. 27. And, where plt. declared on three several promises, but the last count omitted to say that *the deft. had promised*, it was held sufficient, for, as it had been positively alleged in the first count, the same nominative should go to all the promises: *Gatehouse v. Row*, 5 Mod. 305; *Ld. Raym.* 145, s. c.; *Stanhope v. Butler*, 1 Lutw. 233, *Carth.* 309. It has been considered, that where the contract is founded on a legal liability and implied, it is sufficient to state such liability, without alleging formally that the deft. promised, as on a bill of exchange, *Elsee v. Gatward*, 5 T. R. 145, *Stark v. Cheeseman*, 1 Ld. Raym. 538; but see *Morris v. Norfolk*, 1 Taunt. 217, 8; or on a foreign judgment; and a declaration in assumpsit stating an agreement between the two parties, but omitting the mutual promises, was held sufficient, because the agreement imported a promise: *Mountford v. Horton*, 2 N. R. 62.

The parties to the contract must be expressly stated, *Com. D. Plead-er*, C. 18; though the omission or defective statement will be cured

after general demurrer or verdict, as the contract will be considered to have been made to the party from whom the consideration proceeded: *Com. D. Pleader*, C. 18; *Marshall v. Birkenshaw*, 1 N. R. 172. But if it do not appear to whom the promise was made, plt. cannot have judgment: *Sty.* 255; *Noy*, 832, s. c.; *Coulston v. Carr*, Cro. El. 848. On a promise to A. to pay B. a sum of money, if the action be at the suit of B., it is said that the promise should be laid as having been made to B.; *Company of Feltmakers v. Davis*, 1 B. & P. 102; *Arnold v. Revoult*, 4 Moo. 66. On a written contract entered into between the wife of A. and B., which contract A. himself afterwards recognized, a statement that the contract was entered into between A. and his wife and B., would be bad: *Saunderson v. Griffiths*, 5 B. & C. 909, 8 D. & R. 643. An advertisement or general promise of reward to any one who will apprehend a felon, shall not, in general, be declared on as a promise to the particular plt., for there is no privity between the parties themselves: *Rol. Ab.* 6 M. Pl. 1; *Noy*, 11.

The statement of the contract or promise should be positive, and in express terms, and not by way of recital, though, indeed, this is not any fatal objection to the declaration: 1 *Saund.* 274, n. 1. It should also be with precision and certainty to a common intent, though a defect in this respect will be aided by a verdict: *Ward v. Harris*, 2 B. & P. 265; *ante*, 116.

In an action on a promise to pay a sum on a marriage of a girl, an allegation that the debt. asserted and published that he would give £100 to whoever should marry his daughter, is too indefinite and uncertain: 1 *Rol. Ab.* 8, M. pl. 1; *Noy*, 11; *Chandelor v. Lopus*, Cro. J. 4.

Though the contract or promise was in writing, it is not necessary to state it was so in the declaration, even though the Statute of Frauds required it to be in writing: 1 *Saund.* 276, a. n. 2; *Kellner v. Le Mesurier*, 4 East, 400. And there is no difference, in pleading, in the statement of an express or implied promise. Where plt. relies on a promise to take the case out of the Statute of Limitations, he may still declare on the original contract: *Leaper v. Tatton*, 16 East, 420. But in some cases this would not suffice: *Whitehead v. Howard*, 5 Moo. 105; 2 B. & B. 372, s. c.; *Short v. McCarthy*, 3 B. & A. 626; 1 Chit. Pl. 271.

The contract or promise must be stated in its very terms, or according to its legal effect: *Waugh v. Russel*, 1 Marsh. 217; *King v. Pippitt*, 1 T. R. 240; *Paget v. Wheate*, Doug. 669; *Louchamp v. Kenny*, ib. 138. A variance in its statement will render it fatal, as a ground of non-suit; and, if the contract be apparently bad on the face of the declaration, it will not be cured by verdict. Where there is any doubt about what is the legal effect of the contract, the safest way is to state the very language of it, unless it be insensible and ungrammatical, &c., *Whaley v. Pigot*, 2 B. & P. 51, when they should be grammatically and correctly expressed and spelt. However, it is advisable to state, in some of the counts, the substance or \*legal effect of the contract, [\*118] as it is not less liable to misrecitals and literal mistakes, but it may, thereby, be rendered more clear and intelligible. No circumstance material to the contract must be omitted, *Lewes*, 78, *Bass v. Clive*, 4



*M. & S.* 13; but unnecessary repetition must be avoided: thus, it will suffice to state the contract in the first count, and refer to that statement, without repeating it over again in the subsequent counts; as, in declaring upon the conditions of sale at auction, where there were several different estates or parcels of goods sold in separate lots, and for which deft. may have signed separate agreements, but, with reference to the same conditions of sale, after having once stated the conditions in the first count, the other counts must refer to that statement, without repeating the conditions. *Hockin v. Cooke*, 4 *T. R.* 314; *Philips v. Fielding*, 2 *H. Bl.* 123.

As instances of what is a sufficient statement of a contract, according to its legal effect, it has been held, that a contract to furnish goods with a certain latitude as to price, may be described as a contract to furnish them at a reasonable price: *Laing v. Fidgeon*, 6 *Taunt.* 108. Where the contract was laid in the declaration, to deliver stock on the 27th Feb., and the contract proved was to deliver stock on the settling day, which at the time was fixed and understood by the parties to mean the 27th Feb., it was held no variance: *Wicks v. Gordon*, 2 *B. & A.* 335, overruling *B. N. P.* 145. A contract stated to be for the purchase of a certain quantity, to wit, eight tons of goods, is supported by evidence of a contract for the purchase of about eight tons, the precise quantity having been ascertained to be eight tons: *Gladstone v. Neale*, 13 *East*, 410. A joint and several bond is sufficiently described as a joint bond only: *Middleton v. Sandford*, 4 *Camp.* 34; and see *Bass v. Clive*, 4 *M. & S.* 13; *Willis v. Barrett*, 2 *Stark.* 29; post, "*Bills of Exchange.*" Upon an allegation of a loan of lawful money of Great Britain, it is no variance, if the loan is proved to have been of foreign coin: *Harrington v. McMorris*, 5 *Taunt.* 228. A contract for the sale of fifty casks of tallow, at 72s. per cwt., "warranted ready for delivery from ship or warehouse, by the 1st Nov., to be weighed or taken at the king's landing scale," &c., it was held, this was only a general undertaking to deliver, and that the omission of the words "ship or warehouse," was immaterial: *Thornton v. Jones*, 2 *Marsh.* 287; 6 *Taunt.* 581, s. c. Where the contract was stated to be, to deliver a quantity of gum senegal, but the contract proved was for the delivery of rough gum senegal, this was held no variance, as it was proved that all gum senegal, on its arrival in this country, was called rough: *Silver v. Haseltine*, 1 *Chit. Rep.* 39. Where the plts. declared that they agreed to sell, and the deft. agreed to buy, certain goods and merchandises, to wit, three hundred and twenty-eight half chests of oranges and lemons, at, &c., for a certain price, to wit, the price of £623 13s., the contract proved was for three hundred and eight chests, and thirty half chests of China oranges, and twenty chests of lemons, without specifying the price; this was held no variance: *Crispin v. Williamson*, 8 *Taunt.* 107; 1 *Moo.* 547, s. c. Where the contractors stated that deft. had agreed to buy a large quantity of head matter and sperm oil, in the possession of the plt., which was afterwards ascertained to be a given quantity, and the contract proved was for the purchase of "all the head matter, and sperm oil, per the W.," it was held no variance: *Wildman v. Glossop*, 1 *B. & A.* 9. Where a declaration was, that in consideration plt. had delivered to deft.

a watch to repair, deft. undertook to repair and redeliver it to the plt., and a breach of non-delivery, the proof was that the deft. repaired and tendered the watch to the plt. who said, "Take it to my uncle in M., who will pay for it;" when the deft. took it to another uncle who lost it, it was held no variance: *Wilson v. Powis, Bing.* 333. In assumpsit on guarantee, the declaration stated that the defts. undertook to indemnify A. from holding goods in his warehouse, on their behalf. On production of the instrument, it appeared that the defts. only guaranteed him for holding the goods in \*this warehouse, on [\*119] their behalf: it was held that this was no variance, as it must be implied he was to deliver them up to the defts.: *Sampson v. Burton*, 4 *Moo.* 515. A declaration, in consideration that plt. would procure A. to grant a lease to deft., the latter promising to pay the plt. £170, the proof was, that A., having agreed to grant a lease to the plt., the latter undertook originally to assign it to the deft. for the consideration mentioned, but that afterwards a lease, to which plt. was a party, and assented, was granted immediately by A. to the deft. It was held that the evidence proved the substitution of a new contract, to procure a lease from A. to the deft., in lieu of the original contract, and that there was no variance: *Boone v. Mitchell*, 1 *B. & C.* 18.

On the other hand, the statement of a contract to sell oats at so much per bushel, must be taken to mean the Winchester bushel, and will not be supported by evidence to sell by some other bushel: *Hockin v. Cooke*, 4 *T. R.* 314. A declaration or promise to deliver good merchantable wheat, is not supported by proof of a promise to deliver good second sort of wheat: *Anon.* 1 *Ld. Raym.* 735. A contract to remove goods in a reasonable time, is not supported by proof of a contract to remove them in a month: *Hore v. Milner, Pea. Rep.* 42, a. A contract to be performed on request, is not supported by evidence, that it was to be performed on a particular day: 5 *East*, 111. A contract to carry goods, and deliver them to A. B., the plt., varies from a contract to deliver them to J. S.: *Leery v. Goodson*, 4 *T. R.* 687. A variance in stating the name of a ship, on a contract to deliver goods on the arrival of that ship, is fatal: 2 *Camp.* 328. Where a bill of exchange is stated to have been drawn for a certain sum of money, it will be intended to mean English money: *Sprowle v. Legge*, 1 *B. & C.* 16; *Kearney v. King*, 2 *B. & A.* 301. Stating a party to be retained at a certain salary, to wit, £250 per annum, is supported only by proof of a contract for a specific annual salary: *Preston v. Butcher*, 1 *Stark.* 3. Stating a contract to take a full cargo of wheat, is not supported by proof of a contract to take on board five hundred quarters of wheat, though that quantity, in fact, amounts to a full cargo: *Harrison v. Wilson*, 2 *East*, 708. A count stated deft. to be a tenant to plt., and that he promised to use lands in a husbandlike manner; the contract proved, was to farm land in a husbandlike manner, to be kept constantly in grass: this was held a fatal variance: *Saunderson v. Griffiths*, 5 *B. & C.* 909.

The contract must not be stated more specially than it really was, and any additional statement, varying the effect of the contract, will be fatal. Thus, a contract to deliver soil cannot be declared on as a contract to deliver soil or breeze, it appearing that soil and breeze are dif-

ferent articles, *Clarke v. Manstone*, 5 *Esp. Rep.* 239; and see the case of a note being stated to have been made payable at a particular place, when it was not so: *Exon v. Russell*, 4 *M. & S.* 505, *post*. Where two lots were sold under an inclosure act, a declaration upon a sale of "divers, to wit, two lots, &c.," is bad, the agreements being separate, both in law and fact, and not forming one contract: *James v. Shore*, 1 *Stark.* 426; *Emmerson v. Heelis*, 2 *Taunt.* 47.

The omission of any part of an entire contract or promise, and which omission affects that part of the contract, for the breach of which the plt. proceeds, will be fatal; as where the contract declared on, was, that the deft. should deliver to plt. all his tallow, at 4s. per stone, and the contract proved was, that the deft. should deliver it at 4s. per stone, and so much more as the plt. paid to any other person, the variance was held fatal: *Churchhill v. Wilkins*, 1 *T. R.* 447. Where land was alleged to have been demised at a rent of £15, and in evidence the rent appeared to have been £15 and three fowls, the variance was held fatal: *Sands v. Ledger*, 2 *Ld. Raym.* 792. In a case where the plt. purchased a horse for £55, deft. warranting it sound, and agreeing to give [\*120] £1 back if it did not fetch plt. \*£4 or £5, and the averment was, that, in consideration plt. would buy of deft. a horse for a certain price, to wit, £55, deft. undertook horse was sound, it was held a fatal variance: *Blyth v. Bampton*, 3 *Bing.* 472; *Gaselee, J. diss.* But the omission of any immaterial part of the contract is immaterial: *Thornton v. Jones*, *Marsh*, 287; 6 *Taunt.* 582, *s. c.*, *supra*.

Where the contract consists of several distinct parts and collateral provisions, it is sufficient to state so much of it as constitutes that contract, *the breach of which* is complained of, and which prescribes the duty to be performed, and the time, manner, and other circumstances of its performance, 8 *East*, 7; containing the entire consideration for the act, and the entire act which is to be done in virtue of such consideration: *p. Ld. Ellenb.*, *Clark v. Grey*, 6 *East*, 564; *Thompson v. Miles*, 1 *Esp. Rep.* 184; *Miles v. Sheward*, 8 *East*, 7. Therefore, "in an agreement not under seal, containing detailed provisions, regulating prices of labour, rates of hire, times and manner of performance, adjustment of differences, it is unnecessary to set them out:" 6 *East*, 564; *Tempest v. Rawling*, 13 *East*, 20. Where the contract was that plt. should pay for goods by bill at two months, on invoice or delivery, it is sufficient to state that they were to be paid for by bill at two months: *Squier v. Hun*, 3 *Price*, 68; and see further, 1 *Chit. Pl.* 266, 7, 8. Where the plt. declared, that, in consideration of his re-delivery to deft. of an unsound horse, which he had before then sold to the plt., the deft. promised to deliver him another horse, which would be worth £80, and be a young horse, and then alleged a breach in both these respects, the declaration was held sufficient, though the proof was not only of a promise that the second horse should be worth £80, and be a young horse, but also of a warranty that it was sound and never been in harness: *Miles v. Sheward*, 8 *East*, 7; *Thornton v. Jones*, 2 *Marsh*, 287. A declaration on a contract to pay £52 10s. for run-money is supported by proof of a note, by which the deft. undertook to pay the plt. £52. 10s., together with a pint of rum per day: *Baptist v. Cobbold*, 1 *B. & P.* 7. A

declaration that, in consideration plt. would lend def. a horse, def. would take care of it, and return same in as good condition, or pay fifteen guineas, in addition to which terms it was proved that def. contracted to find meat for the horse, it was held no variance: *Handford v. Palmer*, 5 Moo. 74; 2 B. & B. 359, s. c. So, where the contract was stated to be that def. warranted certain bacon to be prime bacon, and the contract proved was a warranty that it should be prime *singed* bacon, it was held no variance: *Cotterill v. Cuff*, 4 Taunt. 285.

No part of the contract which relates merely to the liquidation of damages, and goes in defeasance of the contract, need be stated: *Clarke v. Gray*, 6 East, 564. And, therefore, in contracts with carriers, matter which merely tends to limit their responsibility need not be noticed in pleading, *ib. p. Abbott, C. J., Latham v. Rutley*, 2 B. & C. 22, 3 D. & R. 211; as, in the case of any proviso only affecting the agreement collaterally. In assumpsit for not accepting rice sold, and the contract was to accept per sample, the omission in the declaration of these words was held immaterial; "as they were not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it should be of a particular quality:" *p. Abbott, C. J., Parker v. Palmer*, 4 B. & A. 391. But any matter which qualifies the contract, and destroys the plt.'s right to recover, either *in toto* or in part, or constitutes a condition precedent, must be stated in the declaration. Therefore, on a warranty, where plt. stated that def. warranted a horse to be sound, and the proof was, that def. warranted the horse to be sound every where except a kick on the leg, it was held to be a qualified warranty: *Jones v. Cowley*, 4 B. & C. 445; 6 D. & R. 533. So, exceptions and conditions, qualifying the insurer's liability in a policy of insurance, should be stated: *Strong v. Rule*, 3 Bing. 315. "If a carrier make a stipulation \*that, under certain circumstances, he shall [\*121] not be liable at all," that must be stated, or plt. will fail. Therefore, where plt. stated in his declaration, that def. undertook, for certain hire, &c., to carry goods from London, and deliver them safely at Dover, and the contract proved was, to carry and deliver safely, *fire and robbery excepted*, it was held a fatal variance: *Latham v. Rutley*, 2 B. & C. 22; 3 D. & R. 212. And so, if a carrier's notice is that he will not pay *any thing* upon goods which exceed £5 in value, then it avoids the liability altogether, and must be stated in the declaration, or it will be fatal. But if, as we have seen, he merely limits his responsibility, as, where he says he will not pay *more* than £5 upon any goods, it need not be stated: *Latham v. Rutley*, 3 D. & R. 212; *Clarke v. Gray*, 6 East, 569. If the plt. allege a promise by def. to sell his tallow to the plt. at 4s., and prove an agreement by the def. to sell his tallow to the plt. at 4s. per stone, but that if the plt. gave more to any other person, he should give the same to def. it would be a variance: *Layton v. Pearce*, Doug. 14.

A contract in the alternative must not be stated as an absolute contract, though the option were in the party pleading: *Benny v. Porter*, 2 East, 2; B. & P. 119, n.; *Tate v. Wellings*, 3 T. R. 531. An agreement to pay £20, if a given number should be drawn on a given day, varies from an agreement to deliver an undrawn ticket, or pay 20: *Churchill*

*v. Wilkins*, 1 *T. R.* 448. As, where it was agreed to purchase a hundred bags of wheat, forty or fifty to be delivered on one market-day, and the remainder on the next, and only forty were delivered, and, in an action for the non-delivery of the remainder, the contract was not stated in the alternative, it was held fatal; *Penny v. Porter*, 2 *East*, 2. Where goods have been sold on credit, to be paid for by bill, to be accepted by the vendee, it may be advisable, though not necessary, to state such contract specially, and the breach of it even after the expiration of the limited credit, *Dutton v. Solomonson*, 3 *B. & P.* 582, 1 *Chit. Pl.* 269; and such statement is absolutely necessary, when the action is brought for not accepting the bill before the credit has elapsed: *ib.*, *Mussen v. Price*, 4 *East*, 147; *Hoskins v. Duperoy*, 9 *East*, 498.

*Averment of PERFORMANCE of CONDITION PRECEDENT—When necessary.*] When there are several promises, or agreements, or covenants, which are independent of each other, one party may bring an action against the other for a breach of his promise, &c., without averring or proving a performance of the promise, &c., on his, the plt.'s part; and it is, in such case, no excuse for the deft. to plead or show a breach of the promise on the plt.'s part. But where the promises, &c. are *dependent*, it is necessary for the plt. to aver and prove a performance of the promise, &c. on his part, or what is tantamount thereto, an excuse for the non-performance, to entitle himself to sue for a breach of the promise on the part of the deft.: *Saund.* 320, *a. n.*; *Ughtred's case*, 7 *Rep.* 10, *a. b.*; *Jones v. Barkley*, *Doug.* 690. And, wherever there is a condition precedent, however improbable the thing may be, or difficult to be performed, performance must still be averred: as, where plt. stipulates for the act of third persons, 1 *Saund.* 320, *d.*, *Worsley v. Wood*, 6 *T. R.* 710, 719, though *strangers*, an averment of performance of that act is nevertheless as necessary as in other cases: *ib.*

It is extremely difficult to lay down any general rule as to what constitutes a condition precedent; so much depending on the whole tenor of the contract, and the intention of the parties: *Glasebrook v. Woodrow*, 8 *T. R.* 373; *Hotham v. E. I. Comp.* 1 *T. R.* 645. It makes no difference where the different contracts are placed in a written instrument; the precedency of the performance must depend in the order of time in which the intent of the transaction requires their performance: *Jones v.*

*Barkley*, *Doug.* 690. The words by which conditions precedent are commonly \*created are: "for," *Thorpe v. Thorpe*, 2 *Saund.* 350; "in consideration of," 1 *Ld. Raym.* 665, *Feltham v. Cudworth*, 2 *ib.*, 766; "provided, &c." *Shadforth v. Higgin*, 3 *Camp.* 385; *Thomas v. Cadwallader*, *Willes*, 498; "doing, &c.," "performing, &c.," *Boone v. Eyre*, 2 *W. Bla. R.* 1313, 4; "upon condition, &c.," *Acherley v. Vernon*, *Willes*, 153; "having so done, &c.," *Storer v. Gordon*, 3 *M. & S.* 308. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment; and the party who is to pay shall not be compelled to part with his money till the thing be performed: 1 *Salk.* 171; 1 *Ld. Raym.* 605, *s. c.*; *Tidd*, 439; 1 *Chit. Pl.* 280. The following rules, however,

have been ably collected on the point: 1 *Saund.* 320, n. 4; and see 1 *Chit. Pl.* 277, 280; *Tidd*, 440, 5; *Schw. N. P.* 107; *Lawes, Pl.* c. 5, 6.

1. If a day be appointed for the payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent. And so it is where *no time* is fixed for performance of that which is the consideration of the money, or other act: 1 *Saund.* 320, a. Therefore, if a man covenant to pay another £500 for teaching him a business, £250 to be paid down, and £250 on the 25th Feb. following, an action may be maintained for the second £250, after the 25th Feb., without averring that the plt. taught the deft. the trade: *Campbell v. Jones*, 6 *T. R.* 571. Where A. contracts to build a house for B., and finish it on or before a certain day, in consideration of a sum of money which B. contracts to pay A. by instalments, as the building shall proceed, the finishing the house is not a condition precedent to the paying the money, but the contracts are independent; and A. may therefore sue B. for the whole sum, though the building be not finished at the time appointed: *Terry v. Duntze*, 2 *H. Bla.* 389. If it is *agreed* between A. and B., that B. shall pay A. a sum of money *for* his lands, &c., *on a particular day*, it is an independent contract; and A. may bring an action for the money *before* any conveyance by him of the land, *Thorpe v. Thorpe*, 1 *Salk.* 171, 1 *Saund.* 320; for perhaps the conveyance cannot be made by the day appointed for payment of the money: *Pordage v. Cole*, 1 *Ld. Raym.* 183. See *Irving v. King*, 4 *Carr. & Payne*, 309. Where the plt. declared that, in consideration that he had agreed to deliver cloth to the deft., that deft. agreed to pay him so much in case A.'s horse should win a certain race, an averment that A.'s horse won the race was held sufficient, without averring a delivery of the cloth; but, had the declaration been, that deft. agreed, &c., in consideration that plt. would deliver the cloth, the delivery must have been averred: *Martindale v. Fisher*, 1 *Wils.* 88. Where A. covenanted with B. to serve him with three esquires in the wars of France, and B. covenanted with him to pay him so much money for the service, and it was further agreed that *half the money* should be paid in England, on a certain day, *before* they went to France, and the rest by *quarterly payments* (which also *might* occur *before* the service), it was held an action would lie for the money before the service: 1 *Saund.* 320, b.; 12 *Mod.* 461. A ship, having been let to freight for twelve months, or for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of two, six, ten, and fourteen months, &c., it is no answer to a breach for non-payment of six months' freight, due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped the goods on board her, during the twelve months, which made it necessary for him to unload and repair her, whereby she was unser-

viceable for part of the six months, and that he had paid [\*123] \*the freight for all the time she was serviceable, and that she was not in his service ten months in the whole; for *non constat*, but that, after she had been used by the freighter, she wanted repair, without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repairs: the freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four months to four months, and the ship were lost before the end of fourteen months: *Havelock v. Geddes*, 10 East, 555.

2. But, when a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money before performance: *Thorpe v. Thorpe*, 1 Salk. 171; 1 *Ld. Raym.* 665, s. c.; *Anon. Cro. El.* 46. Therefore, where a ship was let to freight at a certain sum per month, to be paid on her final discharge at the end of her voyage, and she was lost in the middle of her voyage, it was held that no action could be maintained for any freight: *Abbott Ship*, 347; *Smith v. Wilson*, 8 East, 473. So, where freight was to be paid on the ship's arrival at her first destined port, and she was lost before her arrival: *Gibbon v. Mendez*, 2 B. & A. 17. In an action on a covenant against a lessee for not repairing (the covenant adding, "the lessor allowing and assigning timber for the repairs"), it is necessary to aver that the lessor did allow and assign timber, &c.: *Thomas v. Cadwallader*, Willes, 496. In a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice; and that then, from and after expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants, until the end of three or five years, the indenture should cease, and be utterly void. Ruled, that the payment of rent, and performance of the other covenants, are conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice, expiring with the first three years, is not sufficient for that purpose: *Porter v. Sheppard*, 6 T. R. 665. So where bail are bound in a recognisance that, if deft. be condemned, he shall appear in eight days after warning, and render himself, or pay, &c., the plt. must aver that he was warned, for it is a *condition precedent*: *Com. D. Plead. C.* 51. So, where deft. agreed to deliver to plt., at a certain price, fifteen tod of wool, to be chosen by plt. out of a parcel containing seventeen tod, in an action for the non-delivery of the fifteen tod, the declaration was holden bad, because it did not aver that the plt. had chosen the fifteen tod, which was as a condition precedent to the deft.'s delivering them: *Raynay v. Alexander*, Yelv. 76.

3. "Where a contract or covenant goes only to *part* of the consideration on both sides, and a breach of such contract or covenant may be paid for in damages, it is an independent contract or covenant, and an action may be maintained for a breach of the contract or covenant on the part of the deft., without averring performance in the declaration:" 1

*Saund. 320, b.; and p. Ld. Ellenb., Davidson v. Gwinne, 12 East, 389.* For, where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing any thing for it; and, therefore, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. And hence, too, it seems necessary to aver performance of, at least, a part of that which the plt. contracted to do, or that the deft. has otherwise received a partial benefit: as, where A., by articles of agreement, in consideration of a sum of money to be \*paid to him by B., on a certain day, covenants to convey [\*124] to B., on the same day, a house, together with the fixtures and furniture; in an action against B. for the money, A. must aver that he conveyed either the whole of the premises, or, at least, the house, to B., or it must be admitted by B., in his plea, that A. did convey the house, but was not lawfully possessed of the furniture or fixtures: 1 *Saund. 320, d.* Where A., by deed, conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500, and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted that A., *well and truly performing all and every thing therein contained* on his part to be performed, he would pay the annuity; in an action by A. against B. on this covenant, the breach assigned was the non-payment of the annuity: plea, that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title to convey. The Court of K. B., on demurrer, held the plea to be ill; and added, that, if such plea were allowed, any one negro not being the property of A. would bar the action: *Boone v. Eyre, 1 H. Bla. 273, n.; 2 W. Bla. R. 1312, s. c.* The *whole* consideration of the covenant on the part of B., the purchaser, to pay the money, was the conveyance by A., the seller, to him of the *equity of redemption* of the plantation, and also the *stock of negroes* upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to *part* of the consideration, namely, the stock of negroes. But, as it appears that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment, because A. had not a good title to the negroes: *Campbell v. Jones, 6 T. R. 573, p. Ashhurst, J.* Besides, the damages sustained by the parties would be unequal, if A.'s covenant were held to be a condition precedent, *D. of St. Albans v. Shore, 1 H. Bla. 279*: for A., on the one side, would lose the consideration of the sale, but B.'s damage on the other might consist perhaps in the loss only of a few negroes; 1 *Saund. 320, d.* Where "it was agreed between C. and D., that, in consideration of £500, C. should teach D. the art of bleaching materials for making paper, *and* permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification, and C., in consideration of the sum of £250 paid, and of the further sum of £250, to be paid by D. to him, covenanted



that he would, with all possible expedition, teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of £250: in covenant by C. against D., the breach assigned was, the non-payment of the £250; to which it was objected, that it was not averred that C. had taught D. the method of bleaching such materials. The court, however, held, that the *whole* consideration of the agreement being that C. should permit D. to *bleach materials*, as well as *teach* him the method of doing it, the covenant by C. to teach formed but part of the consideration, for a breach of which D. might recover a recompense in damages; and C., having in part executed his agreement, by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration; because he may have sustained some damage by D.'s not having instructed him:" *Campbell v. Jones*, 6 T. R. 570. Where the master and freighter of a vessel of four hundred tons mutually agreed in writing that the ship, being every way fitted for the voyage, should, with all convenient speed, proceed to Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp £5 per ton, for iron 5s. per ton,

&c. \*one-half to be paid on right delivery, the other at three [\*125] months: held that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery: *Ritchie v. Atkinson*, 10 East, 295. Where a charter-party contained a covenant by the owner, that the ship should and would proceed from D., where she then lay, on or before the 12th day of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter that, in consideration of every thing above-mentioned, &c., he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before* the 12th February, such covenant that the ship should sail *on or before* the 12th February, being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damage: *Hall v. Cazenove*, 4 East, 477. A covenant in a charter-party of affreightment, that the owner shall, at his expense, forthwith make the ship tight and strong, &c., for a voyage for twelve months, and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service, and used her for a certain period; but, if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But, if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action: *Havelock v. Geddes*, 10 East, 555. By charter-party between the shipowners and freighters, the shipowners covenanted to take on board six pipes of brandy at Havre, and therewith proceed to Terciera, and there take on board a complete cargo of fruit, or other

goods, as the freighters might think fit, and proceed to London, or Bristol, as might be ordered by the freighters, and there make a right and true delivery of the fruit, &c.; and the freighters covenanted to pay certain freight for the fruit and the brandy, the freight of brandy to be taken out in fruit at Terciera, and guaranteed the ship a full cargo home: held that the covenant to take the brandy to Terciera was not a condition precedent, but a distinct and independent covenant; and therefore the owner, in an action of covenant on the charter-party against the freighters for not putting a full cargo of fruit on board at Terciera, having averred general performance, the declaration was held good on demurrer: *Fothergill v. Walton*, 8 Taunt. 576; 2 Moo. 630, s. c. Where, by charter-party between the shipowner and freighters, the shipowner covenanted to proceed from L. to Naples, and there make a right and true delivery of the outward cargo, and, having so done, receive on board a return cargo, restraint of princes, &c., excepted, and the freighters covenanted, in consideration of the premises, that at N. they would find and provide, as they did covenant and assure to the shipowner, a full and complete return cargo, &c., and that £1750 should be paid on delivery of the outward cargo, which should be considered as earned for outward freight: held, that in covenant against the freighters for not providing a return cargo at N., they could not plead in excuse of performance that the outward cargo was seized by the government at N., and never delivered to them: for the delivery of the outward cargo was not a condition precedent to the providing a return cargo; but the delivery of the outward cargo was a condition precedent to the payment of £1750, and therefore a breach assigned for non-payment thereof was, under these circumstances, not sustainable: *Storer v. Gordon*, 3 M. & S. 308. Where a day is specified for the performance of certain works, and the money is to be paid on performance, although the works be not performed on the day specified, yet an action may be maintained for the money when they are performed; and the party who is to pay the money must have recourse to a cross-action for any damages occasioned by the delay: *Cock v. Curtoys*, cited 1 Saund. 320, b. 5 ed. And, if the deft.'s agreement be continuous, and his liability accrues upon distinct acts at intervals, he will be liable, though plt. does not perform a condition precedent within his limited time, or after a reasonable time, if no period was provided. In such case, the non-compliance of the condition precedent in one instance shall not discharge the deft. from liability on a subsequent occasion, on which, under the same agreement, the condition is performed: as, if a brewer agree to sell porter to an innkeeper, and the latter agree to purchase the same, although the innkeeper be not bound to take bad porter tendered to him, he is liable to receive good porter subsequently offered: *Weaver v. Sessions*, 6 Taunt. 155; *Mawman v. Gillett*, 2 ib. 325, n.; and see 1 B. & C. 460. If a vendee receive one of several articles bought together under one contract, he must pay for such article, although he might have refused to take it: *Champion v. Short*, 1 Camp. 53. Where the deft. agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them, without making such payment, and refused to pay until

the remainder had been delivered, it was held, he was liable for the value of the trees he had taken: *Bragg v. Cole*, 6 Moo. 614. Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plt. may sue for the numbers actually delivered, though not amounting to the whole twenty-four: *Mavor v. Pyne*, 3 Bing. 285.

4. But, where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance or excuse for it must be averred: *Large v. Cheshire*, 1 Vent. 147; *D. of S. Alban's v. Shore*, 1 H. Bla. 270. An entire contract cannot be apportioned; and if a party contract to do a certain work before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion was prevented by accident, as by fire, &c., *Cutter v. Powell*, 6 T. R. 320, *Hulle v. Heightman*, 2 East, 145, *Chit. Cont.* 273; unless, indeed, the deft. disaffirm the entirety of the contract, by receiving what in a law amounts to a partial benefit: *supra*. A. covenants that he will, on or before a certain day, convey to B., by such conveyance as B.'s counsel should advise, *all* the ground before conveyed to him by C.; in consideration of which B. covenants to pay a certain sum, and reserve certain rents, &c., to A., and to lay out a certain sum on the premises: it was held, that A. cannot maintain covenant against B. without averring such a conveyance, or a readiness to convey to B., on or before the day, *all* the land, or that B. prevented him by some act or neglect of his: *Heard v. Wadham*, 1 East, 619. In an action of covenant on a charter-party of affreightment, in which the deft. covenanted to pay so much for freight for goods, delivered at A., freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B. before her arrival at A., though the deft. accept his goods at B.: *Cook v. Jennings*, 7 T. R. 381; *ante*, 125. Under an agreement in the nature of a charter-party, whereby plt. let his ship to freight to the defts., on a voyage from *Shields to Lisbon*, with convoy, the freight to be paid on right delivery of the cargo; the ship having sailed from Shields with her cargo, and joined convoy at Portsmouth, and, after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy, and the defts. having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plt., after notice to the defts., and then was sold by consent of both parties, without prejudice: it was held, that the plt. could not recover freight *pro rata* or demurrage: *Leddard v. Lopes*, 10 East, 526. If a sailor, hired for a voyage, take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and, before the arrival of the ship, he dies, no wages can be claimed: *Cutter* [\*127] *v. \*Powel*, 6 T. R. 320; *Eaken v. Thom*, 5 Esp. Rep. 6; *Curling v. Long*, 1 B. & B. 637; *Frontine v. Frost*, 3 ib., 304; *Thompson v. Rowcroft*, 4 East, 43; *Mulloy v. Backer*, 5 ib., 316; *Atty v. Lindo*, 1 N. R. 239.

5. Where two acts are concurrent, and to be done at *the same time*; as, where A. contracts or covenants to convey an estate, or to deliver goods, to B. on such a day, or generally, and, in consideration thereof,

B. contracts or covenants to pay A. a sum of money on the same day, or generally, neither can maintain an action without showing performance of, or an offer to perform, or discharge from performing, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale: *Callonel v. Briggs*, 1 *Salk.* 112, 3; *Thorpe v. Thorpe*, *ib.* 171; *Giles v. Hart*, 2 *Salk.* 623. In declaring on a promise to pay a sum of money, in consideration that the plt. would execute a release, the declaration must aver that such release was executed or tendered: *Collins v. Gibbs*, 2 *Burr.* 899. In an action for not delivering goods, plt. must in general aver a readiness on his part to pay the price, *Rawson v. Johnson*, 1 *East*, 203; but it does not seem necessary in such case to aver a tender and refusal, if the deft. is to fetch away the goods: *ib.* *Waterhouse v. Skinner*, 2 *B. & P.* 447; *Levy v. Herbert*, 7 *Taunt.* 314; *Wilks v. Atkinson*, 1 *Marsh.* 412. On a promise to pay money in consideration of forbearance by plt., such forbearance must be averred: *Com. D. Pleader*, C. 52. A. agreed to sell B. his estate for a certain sum before a particular day; in consideration whereof, B. agreed to pay that sum on the day, and, on failure, to pay £21: held that they were dependent covenants, and that A. could not recover the £21, without showing a conveyance on his part, or a tender of one: *Goodisson v. Nunn*, 4 *T. R.* 761. Plt. covenanted to sell to the deft. a school-house, &c., and to convey the same to him on or before the 1st August, 1797, and to deliver up the possession to him on the 24th June, 1796; and, in consideration thereof, deft. covenanted to pay the plt. £120 on or before the 1st day of August, 1797: held that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plt. could not maintain an action for the £120, without averring that he had conveyed or tendered a conveyance to the deft.: *Glazebrook v. Woodrow*, 8 *T. R.* 366; see the cases in *Martin v. Smith*, 6 *East*, 555; *Ferry v. Williams*, 8 *Taunt.* 62; *post*, title, "*Vendor and Purchaser*." In an action for non-delivery of corn at S., pursuant to an agreement, whereby the deft., in consideration that the plt. had bought of him a certain quantity at a fixed price, undertook to deliver it to the plt. at S., within one month from the time of sale, the plt. must aver a tender of the price, or what is equivalent thereto: for the delivery of the corn and the payment of the price were concurrent acts, to be done by the parties respectively at the same time; and each must aver performance, or an offer to perform his part, before he can maintain an action against the other: *Morton v. Lamb*, 7 *T. R.* 125. To satisfy an averment that the plt. was ready and willing to transfer, and requested deft. to accept a stock, which he refused, plt. must prove an actual tender and refusal, or that he waited at the bank on the day appointed for the transfer until the close of the transfer-books, the latest moment when the transfer could have been effected: *Bordenave v. Gregory*, 5 *East*, 107.

*Averment of Excuse for Performance of Condition Precedent.* [With respect to what a party, plt. or deft., may state or show as an *excuse for performance* of a condition precedent or contract, it should be premised as a general rule, that the person, to be discharged of an act,

is bound to do the act which is to discharge him: *Co. Lit.* 211, *a.* 210, 220; *Chit. Pl.* 309; *Cranley v. Hilary*, 2 *M. & S.* 120. As, if a party has to pay a sum of money, a mere readiness to do so is not sufficient: he is bound to go to the party entitled to receive it, and [\*128] pay, or tender, the money, in order to exonerate \*himself from liability: *id. Co. Lit.* 340; *Soward v. Palmer*, 2 *Moo.* 276. A tender or offer to perform, which the deft. rejected, is in law as good as an actual performance of a condition precedent. So is a readiness to perform, if the party discharged the other from performing, or prevented the execution of the matter to be performed: 1 *Saund.* 320; *Hothorn v. E. I. Comp.* 1 *T. R.* 638; *Smith v. Wilson*, 8 *East*, 443; *Jones v. Barkley*, *Dougl.* 686. In assumpsit by the vendor against the vendee of land, for not accepting it, and paying the purchase-money, the plt. averred that he was *seised in fee* of the land, and that deft. agreed to purchase it, *on having a good title*; and that his title to the land was made good, perfect, and satisfactory to the deft.; and that he, the plt., had been always ready and willing, and offered to convey the lands to the deft.; but that deft. did not pay the purchase money: and, on demurrer, it was held, that such general allegations of title in the plt., and that his title was made good and satisfactory to the deft., and that the plt. was ready and willing and offered to convey to the deft., were tantamount to performance of agreement on his part, so as to entitle him to recover for a breach of the deft.'s part, in not paying the purchase-money: *Martin v. Smith*, 6 *East*, 555. The deft. purchased a leasehold estate of the plt. at a public auction, subject to certain conditions of sale, which were, "that the purchaser should immediately pay down a deposit in part of the purchase-money, and sign an agreement for the payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase money." Assumpsit was brought by the vendor against the purchaser, for the non-payment of the conditions on his part, after a verdict for the plts., on a motion in arrest of judgment, on the grounds that the plts. had not set out their title, or tendered the conveyances to the deft.: it was held that the plts. were not bound to set out their title; and that allegations that they were ready and willing, and actually offered to convey, were equivalent to a performance of the conditions on their parts: *Ferry v. Williams*, 8 *Taunt.* 62; 1 *Moo.* 498, *s. c.* If there was a place appointed for the plt. and deft. to attend for performance of their mutual acts, an averment of non-attendance by deft. would dispense with an averment of performance by plt.: *Morton v. Lamb*, 7 *T. R.* 129, 31; *Bordenave v. Gregory*, 5 *East*, 107; 2 *B. & B.* 233. Where the respective acts to be done by the plt. and deft. are *mutual*, and were to be performed at the *same time*, a mere readiness by plt. to perform his part, of which deft. had notice, is in general sufficient; or plt. may state an excuse for performance, by reason of deft.'s refusal to perform his part, or his discharge of plt. from his performance: *Jones v. Barkley*, *Dougl.* 684; *Seymour v. Gartside*, 2 *D. & R.* 55. As, where, in an action of assumpsit for not delivering bonds and other se-

curities pursuant to an agreement, where the consideration-money was to be paid on the receipt of the securities, it is not necessary to aver an actual tender of the money; an allegation of plt.'s readiness to perform is sufficient: *Levy v. Herbert*, 1 *Moo.* 56; *Morton v. Lamb*, 7 *T. R.* 130. In an action for the non-delivery of malt, which deft. had undertaken to deliver on request at a certain price, it is sufficient for the plt., in his declaration, to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of sale; but that deft. refused to deliver it, without averring an actual tender of the price: *Rawson v. Johnson*, 1 *East*, 203.

On the other hand, where the deft. has agreed to pay for a copyhold estate, upon receiving a good title, and a proper surrender, in an action for the money, it will not be sufficient to aver an offer to make a good title, but the plt. must show that he furnished an abstract of a good title to deft., and offered to surrender, &c., but that the deft. refused: *Phillips v. Fielding*, 2 *H. Bla.* 123. And in an action on a [\*129] contract for stock, the plt. must aver either an actual tender and refusal of the stock, or that which is equivalent to it, viz. an attendance at the place of transfer until the last moment at which transfers are made, on the day appointed, and a notice given to the deft. that he might then and there attend to receive it, and a neglect or refusal on the part of the deft. to do so: *Bordenave v. Gregory*, 5 *East*, 107; *Giles v. Hart*, 2 *Salk.* 623; *Lancashire v. Kellingworth*, *Com. R.* 116; *D. of Rutland v. Hodgson*, 2 *Str.* 777; *Merrit v. Rane*, 1 *ib.* 458; *Clark v. Tyson*, *ib.* 504; *Thornton v. Moulton*, *ib.* 533. The performance of a condition or contract is not excused, where the prevention of such requisite performance arises from a mere stranger: *Worsley v. Wood*, 6 *T. R.* 710.

If a party entitled under a contract to receive a profit from another, by his own acts so confounds the measure of that which he was to receive, that it can no longer be ascertained, he vacates his whole claim; as, where A. agreed to find sufficient coal for B.'s engine to draw water from A.'s mine, and B.'s little coal mine, *as they then stood*; and B. sunk to a lower seam, in draining which he drained the other two seams, but consumed for his engine more coal than before, it was held that A. was no longer bound to furnish any coal, because B. had destroyed the measure of sufficiency: *Pringle v. Taylor*, 2 *Taunt.* 150.

There are some cases, where the thing agreed to be done having been in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it has been deemed a substantial performance, *Worsley v. Wood*, 6 *T. R.* 722: as, where a condition was to enfeoff, a conveyance by lease and release has been deemed sufficient, *Co. Lit.* 207, *a.*; so, if the condition be for one to deliver the will of the testator, and he delivers letters testamentary: 1 *Roll. Ab.* 426, *pl.* 2, 4; *Poynter v. Poynter*, *Cro. C.* 194.

Where the law casts a duty on a party, the performance is excused if rendered impossible by the act of God; but where a party, by his own contract, engages to do an act, it is deemed to be his own act and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility on certain events; and, in such case,

therefore, it is in the nature of an absolute and general contract; the performance is not excused by an inevitable accident, or other contingency, although not foreseen by or within the control of the party: *Hadley v. Clarke*, 8 T. R. 267; *Maryon v. Carter*, 4 Carr. & Payne, 295; *Com. D. Ass. G., Chit. Cont.* 273.

"A statute will sometimes excuse the performance of a contract: as, where a person contract not to do a thing which it was lawful for him to do, and an act of Parliament comes after, and compels him to do it, there the act repeals the contract, and *vice versa*; but, where a man contracts not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant:" *Brewster v. Kitchin*, 1 Ld. Raym. 321; *Touteng v. Hubbard*, 3 B. & P. 301; *Jacques v. Withy*, 1 H. Bla. 65; *Barber v. Hodgson*, 3 M. & S. 270.

*Form of Averments of Performance, or Excuse for Performance.*] Averments should be formally stated by an express allegation; as, "that plt. avers," or "in fact saith:" *Com. D. Pleader, C.* 77; 1 *Saund.* 117, n., 235; 2 *ib.*, 61, g. And, when an express averment of performance is necessary, plt. must aver it with time and place, when and where it was done, and the performance must be precisely alleged, and with reasonable certainty, that the court may judge whether the intent of the contract has been duly performed: as, on a contract in consideration that plt. would acquit A. of a debt, it is not sufficient to say that he acquitted him, without showing how; viz. by deed: *Lenerit v. Rivet, Cro. J.*, 503; *Com. D. Pleader, C.* 60; *sed quere*. But, in general, it suffices to state it in general terms, without alleging the particulars of the performance: as, on a promise\* to pay so much as the plt. should expend for the officers of the army in such a suit, an averment that he spent so much is sufficient, without showing for what officers in particular: *Com. D. Pleader, C.* 61; *Jermey v. Jenny, T. Raym.* 8, 9. In a declaration on a contract to pay so much if the plt. would marry deft.'s daughter at his request, an averment that he did marry her, without saying at the deft.'s request, is sufficiently certain: *Poynter v. Poynter, Cro. C.* 194. The performance must be averred to have been according to the agreement and intention of the parties, *Jermey v. Jenny, T. Raym.* 8, 9, *Com. D. Pleader, C.* 61: as, on a promise in consideration that the plt. would cause A. to come to be bound to the deft. for £20, it is not sufficient to aver that the plt. caused A. to come to be bound, but it ought also to be alleged that A. was bound: *Com. D. Pleader, C.* 58; *Game v. Harvie, Yelv.* 50. An exact performance, according to the intention of the parties, must also be stated: *Com. D. Pleader, C.* 59; *Dorrington v. East, Yelv.* 87. When an exact performance is not necessary, *ante*, 129. Where the contract is in the disjunctive, the averment of performance should be so, and not in the conjunctive; and, if the agreement be in the conjunctive, the averment should pursue it. But, after verdict, if a conjunctive expression may, by any construction be taken disjunctively, according to the contract, the court will so construe it: *Burgess v. Brazier*, 1 Str., 594. It is usual, in declarations on mutual promises and in covenant between land-

lord and tenant, &c., to aver that the plt. hath performed all things on his part to be performed; but this is unnecessary, 1 *Saund.* 234, c. n. 5; though it may after verdict aid the omission of an averment of a special performance: *Thorpe v. Thorpe*, *Lutt.* 253; *Sir T. Jones*, 125, 1 *Chit. Pl.* 282. Where an averment of performance is necessary, the plt. must not only aver that he was ready and did all he could to perform it, but must allege the particular circumstances which prevented him from so doing. It is insufficient to allege that he or another could not perform it without showing why or by what means they were prevented: *Coppice v. Hurnard*, 2 *Saund.* 129.

*Consequences of Omission or Mistatement of Averment of Performance, &c.*] If an averment of performance, when essential, be entirely omitted, it may be taken advantage of on motion in arrest of judgment, after judgment by default, *Collins v. Gibbs*, 2 *Burr.* 899, or even after verdict: *Worsley v. Wood*, 6 *T. R.* 710; 1 *Chit. Pl.* 285. But, if it be merely informally alleged, it cannot be taken advantage of after plea pleaded, 12 *Mod.* 460, or after verdict: *Burgess v. Brazier*, 1 *Str.* 594. And the declaration will always be sustained after verdict, if it appear upon the whole record that there has been a substantial performance of all the considerations declared on: *Lee v. Edwards*, 1 *Vent.* 44; 1 *Lev.* 280, s. c.; and see, *supra*, as to averment of general performance.

*Averment of REQUEST—When necessary.*] When it is essentially necessary, by the terms of the contract, that the deft. should be requested by plt. to perform his part of the contract, such request, being a condition precedent, must be specially alleged in the declaration, and proved: *Com. D. Pleader*, C. 69; 1 *Saund.* 33, n. 2. It is a general rule, that where a mere duty or sum of money, which the deft. is in duty bound to pay, is promised to be performed or paid on request, there needs no actual request; but, where a collateral duty or sum is promised to be performed or paid on request, there must be an actual request, *Birke v. Trippet*, 1 *Saund.* 33, a., or some averment to excuse it: *Amory v. Brodrick*, 5 *B. & A.* 712; 1 *D. & R.* 361, s. c. And *Abbott, C. J.*, in that case, said, "a party is only bound to allege a request where the object of that request is to oblige another to do something." Thus, where a party promises to pay on request money previously due, plt. need not make or aver a request \*to pay: *B. N. P.* 151, [\*131] b. The bringing of the action would, in that case, be a sufficient request: *Simpson v. Routh*, 2 *B. & C.* 683; *Wallis v. Scott*, 1 *Str.* 88. And, where the debt or duty arises immediately on the performance of the consideration, no request need be stated: as, where the declaration stated that the deft., in consideration plt. would make him a set of sails worth £45, promised to pay so much for them on request, it was held, no request to pay was necessary to be stated, because, on the making of the sails, the money immediately became due: *ib.*, *Bokenham v. Thacker*, 2 *Vent.* 75. And, though a distinction was formerly taken between a promise by the deft. to pay a debt originally his own, and that of a third person,



that distinction is now overruled: *ib.*; *Hill v. Wade*, *Cro. J.* 523. No demand of payment need be made on a note payable on demand, *Chit. B.* 361, 373, *sed quære*; and no request is necessary where the deft. is to perform the first act, *Bristow v. Waddington*, 2 *N. R.* 355, or where the party has, by his own act, rendered the performance of the contract by him impossible: as, where deft. was to deliver a certain quantity of hay to plt. on request, and it was stated and proved that deft. had otherwise disposed of it: *Bowdell v. Parsons*, 10 *East*, 359; *Amory v. Brodrick*, 5 *B. & A.* 716; 1 *D. & R.* 361, *s. c.* And, in the case of a lessor and lessee, where the rent was appointed to be paid at the lessor's house, it was held, no demand of rent was requisite: *Rede v. Farr*, 6 *M. & S.* 121; *Sicklemore v. Thistleton*, *ib.*, 9. On an award merely awarding payment at a particular time and place, no demand is necessary: see 2 *B. & B.* 235. On the other hand, in an action for not marrying on request, plt. should aver a request, or some other allegation to dispense with it: *Seymour v. Gartside*, 2 *D. & R.* 55. In an action against an agent for not accounting, a request to account should be averred: *Topham v. Braddick*, 1 *Taunt.* 578. So, on a contract to deliver up a bond to be cancelled on request, 3 *Bulst.* 549; or on an award to perform an act on request, *Birks v. Trippet*, 1 *Saund.* 32; or, in debt, on a single bond for the payment of money on request, such request is necessary: *Simpson v. Routh*, 2 *B. & C.* 685; *sed vide Capp v. Lancaster*, *Cro. El.* 548, *Thompson v. Butler*, *ib.* 721. So, on an award to pay money on plt.'s executing a covenant of indemnity, a request to pay, and plt.'s readiness to execute the covenant, must be averred; for they are concurrent acts: *Phillips v. Knightley*, *Fitzg.* 53; *Rowe v. Young*, 2 *B. & B.* 234. So, in an action for not delivering goods sold by deft. to plt., or exchanged between them, or for not finding timber for repairs, &c., a special request to deliver the same must be alleged: *Back v. Owen*, 5 *T. R.* 409; *Jones*, 56. A request of payment should be made on sheriff previous to an action for not paying over the proceeds of an execution: *Jefferies v. Sheppard*, 3 *B. & A.* 696. Where a deft. by deed covenanted, at the request of plt., to avow, justify, and maintain, all actions brought by him, it was considered necessary to state such request of plt., in an action against deft. for not so maintaining, &c.: *Amory v. Brodrick*, 5 *B. & A.* 712; 1 *D. & R.* 361, *s. c.* But it was held that an averment that deft. had, by executing a release, disabled himself from maintaining an action, dispensed with the averment of request.

*Form and Manner of stating Request.*] When a special request is necessary, it must be stated with time and place, and by and to whom it was made: 3 *Bulst.* 298; *Wallis v. Scott*, 1 *Str.* 88; *Com. D. Pleader*, *C.* 69; *Back v. Owen*, 5 *T. R.* 409. The general averment, "although often requested," &c., will not be sufficient; and the request must be so set forth, that the court may judge whether it was sufficient according to the contract, *Hardw.* 38; *Skin.* 391. But is sufficient, after showing time and place, to allege that it was "then and there" made, *Bokenham v. Thacker*, 2 *Vent.* 74, 5, 1 *Saund.*

33, *a.*; and any affirmative words will be sufficient, *Ashe v. Doughty*, *Yelv.* 121; and a request in the second count \*may [\*132] refer to first: *Barnes v. May*, *Cro. El.* 240. If a special request be unnecessarily stated, *plt.* is not bound to prove it: *Buckley v. Thomas*, *Plow.* 128. The usual averment of "although often requested so to do," without stating the time and place of request, is of no avail in pleading, and the omission of it is immaterial, *Phillips v. Fielding*, 2 *H. Bla.* 131, *Morgan v. Sargent*, 1 *B. & P.* 59, *Frampton v. Coulson*, 1 *Wils.* 33; though, indeed, its insertion will sometimes, after verdict, avoid a defect in or omission of stating a special request.

*Consequences of Omission of, or Defect in, Averment of Request.]* The total omission of an averment of a special request, when necessary, is a substantial defect, although the general words, "although often requested so to do," be inserted; and such omission may be taken advantage of by general demurrer, *Back v. Owen*, 5 *T. R.* 409, but not after verdict: *Bowdell v. Parsons*, 10 *East*, 359; *Jones*, 56; *Wallis v. Scott*, 1 *Str.* 89; *Pulgrave v. Windham*, *ib.* 214; *Seymour v. Gartside*, 2 *D. & R.* 55; 1 *Chit. Pl.* 290. And the omission of time and place can be taken advantage of only by special demurrer: *Bowdell v. Parsons*, 10 *East*, 359. The omission of the general averment of "although often requested so to do," is, as we have seen, immaterial: *supra*.

*Averment of NOTICE to Defendant, when necessary.]* Wherever the fact upon which the *deft.*'s liability is incurred, lies peculiarly within the knowledge and privity of the *plt.*, notice thereof must be stated to have been given to *deft.* previous to the commencement of the action: *Rex v. Holland*, 5 *T. R.* 621, 624; 2 *Saund.* 62, *a.* As where the *deft.* promises to give the *plt.* so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the *plt.* should buy: or pay to *plt.* what damages he had sustained by a battery, or to pay the *plt.*'s costs of suit: *Hardw.* 42; 16 *Vin. Ab. Notice*; *Rex v. Holland*, 5 *T. R.* 621; *Tidd*, 442. But when the matter does not lie more peculiarly in the knowledge of the *plt.* than of the *deft.*, no notice is requisite: *Hardw.* 42; 1 *Saund.* 117, (2.) Therefore, if a man contracts to do a thing on the performance of an act by a stranger, notice need not be averred, for it lies in the *deft.*'s knowledge as much as the *plt.*'s, and he ought to take notice of it at his peril: *ib.*; 2 *Saund.* 62, *a. n.* 4. Where the *deft.* promises *plt.* to give as much as a third person named, there the information was as accessible to the *deft.* as the *plt.*: 11 *Mod.* 48; *Smith v. Goff*, 2 *Salk.* 457, 3 *Ld. Raym.* 1127, *s. c.* And so in the case of an award, no notice thereof need be stated, 2 *Saund.* 62, *a.*, unless it be expressly stipulated that a notification be made to the parties: 2 *Bulst.* 144. And, in an action on a promissory note by endorsee against drawer, notice of the endorsement need not be averred: *Reynolds v. Davies*, 1 *B. & P.* 625. And on a promise to pay so much money on the full age of an infant, no notice is requisite of his having attained that age, 1 *Saund.* 117, *n.* 2 *Tidd*, 442; or where, *deft.* had been a party to a previous suit, or decree, no

notice thereof was deemed requisite: *Ashe v. Doughty*, *Yelv.* 121. Where the deft. by the terms of the contract, engaged to take notice at his peril, no notice need be averred, even though the fact peculiarly lie in plt.'s knowledge: as, where he contracted to pay money on the marriage of the plt. with B., 2 *Bulst.* 354, *Com. D. Pleader*, c. 75; and, in the case of a consideration precedent, to be performed by the plt. to the deft. in person, no notice of the plt.'s performance need be averred: *Com. D. Pleader*, c. 75. But where the acts to be performed by each party are mutual, and to take place at the same time, the plt. should aver a notice of a readiness by him to perform his part of the contract, or something dispensing with it: *Seymour v. Gartside*, 2 *D. & R.* 55. If the plt. expressly or impliedly contracts to give deft. notice of an act, such notice must be given and averred according to [\*133] the fact, as in the cases of bills \*of exchange, &c.; notice of the dishonour must, in general, be given by the holder to the other parties whom he means to sue: *post*, "*Bills of Exchange*."

*Manner of averring Notice.*] The notice must appear to have been given at a proper time and to a proper person: *Com. D. Pleader*, c. 74. And an excuse for the want of notice, when it could not be given, must be stated: *Nurse v. Frampton*, 1 *Salk.* 214; 1 *Ld. Raym.* 28, s. c.; 16 *Vin. Ab. Notice*, A. 2; *Stweton v. Cashe*, *Yelv.* 37; *post*, "*Bills of Exchange*." Where there is a special request, notice will, in general, be implied: *Bradley v. Toder*, *Cro. J.* 228; *Reynolds v. Davies*, 1 *B. & P.* 626, 3 *Bulst.* 326.

*Consequences of Omission or defective Statement of Notice.*] The omission of an averment of notice may be taken advantage of by demurrer, or in arrest of judgment: *Henning's case*, *Cro. J.* 432; but it is, in general aided by verdict, *Palgrave v. Windham*, 1 *Str.* 212, 1 *Saund.* 228, n., *Seymour v. Gartside*, 2 *D. & R.* 55: except where the plt. contracts to give it, as in an action against the drawer of a bill, where the omission of notice of the non-payment of the acceptor was held fatal, even after verdict: *Rushton v. Aspinall*, *Doug.* 679.

*Averment of BREACH, when necessary.*] It is necessary in all cases for the plt. to allege a *breach* of the contract: *Com. D. Pleader*, c. 44, &c.

*Form of Averment of Breach.*] The breach is usually alleged after the statement of the contract, and all other averments except the averment of damages. When there are several counts in the declaration for a money demand, one breach may be so framed as to be applicable to all such counts: as, in actions on bills of exchange and the common counts, the breach usually inserted after the account stated will do: *Frampton v. Coulson*, 1 *Wils.* 33; *Butterworth v. Le Despencer*, 3 *M. & S.* 150. But this would be found almost impracticable in an action, not merely for the non-payment of money. The plt. may assign in one count as many breaches of *different* stipulations as he chooses, and, where the contract was *general*, as by a tenant to observe the

due course of husbandry, the declaration may, in one count, state various breaches of good husbandry: *Com. D. Pleader*, C. 33; *Legh v. Hewitt*, 4 East, 154, 1 Chit. Pl. 295. As to several breaches on bonds, *post*, "Bonds." The usual averment of deft.'s contriving, &c. to injure, &c. the plt., is unnecessary, *Bailiffs of Tewkesbury, v. Diston*, 6 East, 443; and, in a declaration against a peer it should be omitted: *Imp. K. B.* 526.

The breach must be so assigned, and with such certainty, as to show the subject matter of complaint; a breach that deft. has not performed his agreement or promise, is too general, and bad, *Com. D. Pleader*, 48, *Skin.* 344, 7 Price, 550; but the breach may be assigned with less particularity and more conciseness, when great prolixity would be thereby avoided, *Barton v. Webb*, 8 T. R. 463, *Shum v. Farrington*, 1 B. & P. 640, *Gale v. Reed*, 8 East, 85; and, where the breach lies more in the deft.'s than the plt.'s knowledge, less particularity is required: 8 T. R. 463, 8 East, 80. It may be assigned in the words of the contract, or in words which agree with the sense and substance of it: *Com. D. Pleader*, b. 45, &c.; 2 Saund. 181, b. c. In an action on deft.'s promise to pay the debt of a third person, a breach that deft. did not pay the debt, has been held in substance and effect to agree with the terms of the contract, 1 Sid. 178, 2 Roll. 738; and so, in debt on bond, conditioned for payment of an annual sum to the wife of an obligee, a breach assigned in non-payment of the same to the obligee is sufficient: *Lunn v. Payne*, 6 Taunt. 140, 1 Marsh, 495, s. c. So, in an action on a policy for loss by barratry of the captain, an averment that the ship was lost by the fraud of the captain suffices: \**Knight v. Cambridge*, 1 Str. 581. On a contract not to re-lease or alien without license, it must be averred that deft. released or aliened without license, though, indeed the burthen of proving the license lies on deft.: *Sir T. Jones*, 229, *Skin.* 120. [\*134]

More certainty is required in assigning an affirmative breach, that is a breach that the deft. has done that which he contracted not to do, than a negative breach, that is a breach that the deft. has not done something he contracted to do: *ib.* In the former case, time and place must be alleged to the breach, but not so in the latter, if the breach on the face of it is complete and co-extensive with the contract without such allegation. In an action by an apprentice for not finding victuals and other necessaries, a breach in the words of the contract suffices: *Proctor v. Burdett*, 3 Lev. 170. And, in a covenant for not repairing, a breach in the words of such covenant suffices, without enumerating the particular dilapidation: *Lutw.* 329; *Harris v. Mantle*, 3 T. R. 308. On a contract to show a sufficient record, it suffices to aver deft. did not show a sufficient record: *Heyford v. Reve*, Yelv. 39, 40. And, in an action on a condition that one B. should account and pay over to plts. such voluntary contributions as he should collect for the charity, an averment that B. "had received divers large sums of money, amounting to a large sum, to wit, £100, from divers persons for divers voluntary contributions for the said charity," which he had not accounted for or paid over, is sufficient: *Barton v. Webb*, 8 T. R. 463; *Shum v. Farrington*, 1 B. & P. 640; *Gale v. Reed*, 8 East, 85. On the other

hand, if the contract were for quiet enjoyment without *lawful* disturbance, a breach merely stating that the plt. was disturbed, is insufficient, for it should be that he was by lawful means disturbed, in the words of the covenant or otherwise. The plt. should show by whom he was disturbed, and how: 2 *Saund.* 181, *b.* So where the declaration is on a contract for good title, it should be shown that the person evicting had a lawful title before or at the time of the date of the grant to the plt., and an averment that he had a lawful title without this justification is too general, and bad after verdict; for it will be intended that the title of the person entering is derived from the plt. himself; but the plaintiff is under no necessity of setting out the title of the person who entered upon him: 2 *Saund.* 181, *n.* 10; *Com. D. Pleader*, c. 47, 49.

The breach must be assigned in terms co-extensive with the contract, and not be too *narrow*. Thus, in an action by the assignee, heir, or executor, the breach should be, that the deft. did not perform the act to the original contractor or the plt.; and so, if it be against an assignee, heir, or executor, the declaration should state, that neither the original contractor or deft. performed the act. And a declaration by husband and wife, or by an administrator, merely stating that the deft. did not pay before marriage, or that he did not pay since the death, would be bad on demurrer, though aided by verdict: *Elstob v. Thorowgood*, 1 *Ld. Raym.* 284; *Hornsey v. Dimoche*, 1 *Vent.* 119. So, in *sci. fa.* on a recognisance of bail, conditioned, that, if J. B. and G. K. be condemned, they shall *pay or render*, after an allegation that J. B. was condemned, it is *not sufficient to aver* that J. B. and G. K. *did not pay or render*, without adding, "nor did either of them:" *Wilkinson v. Thorley*, 4 *M. & S.* 33. For, although payment by one would be payment by both, yet a render of one is not a render of both, consistently with the allegation, B., against whom only the judgment was, might have rendered, which would have been sufficient to discharge the recognisance: 1 *Saund.* 234, *c.* And, if the promise were in the disjunctive, to do one or other of two things, the breach must deny he did either; as, if a contract be, that "the deft. and his executors and assigns should repair," a breach for not repairing should be in the conjunctive: *Colt v. How*, *Cro. E.* 348; *Gyse v. Ellis*, 1 *Str.* 228. So, on a promise to deliver a horse by a particular day, or pay a sum of money, it should be denied deft. did either: 1 *Sid.* 440; *Hard.* 320; *Plummer v. [135]* \**Woodburne*, 4 *B. & C.* 634; 7 *D. & R.* 249, *s. c.* But, if the breach in this respect be co-extensive with and according to the substance of the contract, it will suffice: as, where there are several defts., an averment that they have not paid suffices, for a payment by one is a payment by all. So, in an action by several persons, or where deft. is to perform his act to several persons, an averment that he did not perform it to them suffices, without adding the words, "or either of them:" *Aleberry v. Waleby*, 1 *Str.* 231, 1 *Saund.* 235. So, if a contract be to perform an act *to or by* a person or his assigns, it need not be averred that it was not performed *to or by* the assigns: *Gyse v. Ellis*, 1 *Str.* 228.

The breach must not be more extensive and *large* than the deft.'s contract, so that thereby it remains uncertain whether the contract has

been broken. As, in a contract to repair a fence, except on the west side thereof, a breach that the deft. did not repair the fence, without showing that the want of repair was in other parts besides on the west, is bad on demurrer, *Com. D. Pleader*, C. 47; though not after verdict, *ib.*; *sed vide Spires v. Parker*, 1 T. R. 144, 5. And, if the matter to be performed by the deft. depend on a certain event, the happening of that event must be averred: as, if the promise be to account for moneys to be received by deft., the receipt of money ought to be averred: *Serra v. Wright*, 6 Taunt. 45. A declaration for taking an insufficient security for an annuity, containing no averment that deft.'s retainer was for reward or in any particular character creating a duty, was held insufficient, the contract and breach not being co-extensive with each other: *Dartnall v. Howard*, 4 B. & C. 345. It is injudicious to narrow the breach unnecessarily: and, where plt. stated as a breach, that the deft. had not used the premises in a husband-like manner, &c., but, *on the contrary*, committed *waste, spoil, and destruction*, these latter words were held to exclude evidence as to bad husbandry in not sowing, &c., as they tied down plt. to proof of such facts as amounted to waste, spoil, or destruction: *Harris v. Mantle*, 3 T. R. 307. When an averment is divisible, the plt. may recover, though he only prove a part of the breach alleged in the pleadings: as, in an action against the sheriff for a false return, an averment that A. and B. had goods in his bailiwick, is divisible, and is supported in evidence by proof that A. only had property therein: *Jones v. Clayton*, 4 M. & S. 349; *Forty v. Imber*, 6 East, 437; *Barnard v. Duthy*, 5 Taunt. 27.

*Consequence of Omission, or defective Statement of Breach.*] The total omission of a breach, or a defective statement of it, so that thereby the contract does not appear to have been broken, would, it should seem, be bad after verdict: *Hob.* 198, 233; 1 *Sid.* 440; *Lunn v. Payne*, 6 Taunt. 140; *Siclemore v. Thistleton*, 6 M. & S. 9; 7 *Price*, 550. But a mere informal statement of it, provided there be sufficient matter, on the whole, to show a breach of the contract, would not be bad, except on demurrer, or, perhaps, in some cases, on a judgment by default; and, therefore, where, in an action against husband and wife, on the contract of the *feme*, whilst *sole*, to perform an award, it appeared that the award was made after the marriage, which was a legal revocation of the arbitrator's authority, and consequently the breach was improperly assigned in the non-performance of such award, it was held the plt. was entitled to recover, because it appeared that the *feme* had broken her covenant by the very act of her marriage, which, though a different breach to that assigned, was sufficient, after verdict, to support the declaration: *Charnley v. Winstanley*, 5 East, 270, 1; *Perreau v. Bevan*, 5 B. & C. 284; *Sir T. Jones*, 125; *Vivian v. Champion*, 1 Salk. 140. If one of several breaches, or a part of a breach, be improperly assigned, the deft. cannot demur of the whole: *Amory v. Brodric*, 5 B. & A. 712, 1 D. & R. 361, s. c.; *Duffield v. Scott*, 3 T. R. 374; *Orton v. Butler*, 5 B. & A. 652; *Samuel v. Judin*, 6 East, 333; 1 N. R. 43, s. c.; *Powdick v. Lyon*, 11 East, \*565. [\*136] And, if he does so demur, plt. may have judgment for the

breaches or part of the breach well assigned: 1 *Saund.* 285. If one of several breaches be ill assigned, and so that the same be not cured by verdict, and general damages be given, judgment may be arrested: *Sicklemore v. Thistleton*, 6 *M. & S.* 9.

*Averment of DAMAGES.*] If the contract be broken, the plt. will be entitled to some damages, however small, whether they be stated or not, for damages will be implied from the very breach itself, and wherever the damages sustained necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, in order to prevent the surprise on the deft., which might otherwise ensue at the trial; and, if he do not state them particularly, he will not be permitted to prove them in evidence: *Hartley v. Herring*, 8 *T. R.* 130; *Vin. Ab. Damages*, 1 *Chit. Pl.* 296-7, 347. Thus, in an action against a vendor of an estate for not making a good title to, or conveying same, only the deposit can be recovered under the count for money had and received; and, if the purchaser proceed for interest and expenses, he must declare specially, stating such expenses, and the loss arising from not having the use of the deposit, *Camfield v. Gilbert*, 4 *Esp. Rep.* 223, *Walker v. Constable*, 1 *B. & P.* 306, *Fleureau v. Thornhill*, 2 *W. Bla. Rep.* 1078, *Slack v. Lovel*, 3 *Taunt.* 157; though, indeed, if the jury give interest and expenses, the defect is cured: *ib.*; *Gordon v. Swan*, 12 *East*, 419; 2 *Bing.* 4; *post*, "Vendor and Purchaser." In some cases, where the damages constitute the principal ground of action, they must be stated specially: *Dartnall v. Howard*, 4 *B. & C.* 345. The damages stated; or to be recovered, must be proximate, and not remote, or depending on a contingency; and, therefore, in an action for not replacing stock, it will be of no avail to state in the declaration that the plt. was prevented from completing an advantageous contract he had entered into: 1 *Chit. Pl.* 296. As to evidence of damages in assumpsit, tort, *post*, "Case."

The damages must be stated according to the facts; and, as the jury cannot give greater damages than those stated, the plt. should take care to state them sufficiently extensive, *Cheveley v. Morris*, 2 *W. Bla. R.* 1300; especially as the jury may give less than the amount claimed: *Dow's R.* 207; *Gardiner v. Croasdale*, 2 *Burr.* 904. As, in declaring on a policy, under a statement of a total loss, a partial one may be recovered, *ib.* The damages must appear to have arisen as a legal result of the breach of the contract, *supra*. In the statement of them, the word "whereby," or "by means of the premises," &c., refers to all the antecedent matter: *Perreau v. Bevan*, 5 *B. & C.* 292.

Where the damages recoverable, are, by the terms of the contract, made liquidated damages, the jury are bound, by the agreement of the parties, to give that sum; and plt. should, therefore, insert a count to meet his claim in this respect: *Lowe v. Peers*, 4 *Burr.* 2225; *Barton v. Glover*, *Holt*, 43, 1 *Saund.* 58, b.; *Clarke v. Gray*, 6 *East*, 567; *Harrison v. Wright*, 13 *ib.* 345. The damages must be stated as having occurred previous to the bringing the action: 2 *Saund.* 171, n. 1; *Carter v. Calthorpe*, 3 *Lev.* 345. As to the statement of special damages, *post*, "Case." As to the common conclusion, "To the damage," &c., *post*, "Declaration."

II. COMMON COUNTS.] We have already shortly noticed when a declaration in assumpsit may be framed on the common counts; and, when this is the case, they should always be inserted, though there be also special counts, as they will frequently secure a verdict, 1 *Chit. Pl.* 297; especially in cases where the plt. fails in proving the special agreement as stated, where it has been executed by plt. entirely or in part, or where \*def't. has prevented the execution: *Farr v. Price*, [\*137] 1 *East*, 58; *Mowbray v. Fleming*, 11 *ib.* 285; *Studdy v. Sanders*, 5 *B. & C.* 638; *Horford v. Wilson*, 1 *Taunt.* 12, 1 *Chit. Pl.* 298. Thus, if plt. declare specially on a building agreement for the price of his labour, if he fail to prove his compliance with such agreement, he may, in some cases, recover on the common count for work and labour and materials: *Cooke v. Munstone*, 1 *N. R.* 355, *B. N. P.* 139; *Basten v. Butter*, 7 *East*, 479; *Ellis v. Hamlen*, 3 *Taunt.* 52. And, as to when the plt. may resort to the common counts in an action on a bill of exchange, *post*, "*Bill of Exchange*." Where the demand is founded on a written agreement, which ought to be, but is not, stamped, the plt. will not be permitted in evidence to resort to an implied contract, in order to avoid the production of such express agreement: *White v. Wilson*, 2 *B. & P.* 118; *Brewer v. Palmer*, 3 *Esp. Rep.* 213; *Gay v. Gower*, 2 *Marsh*, 273; *sed vide Alves v. Hodgson*, 7 *T. R.* 241; *semb. contra*. And, if there were no privity of contract between the parties, independent of the special contract, the common counts will be of no avail: *Arnfield v. Bate*, 3 *M. & S.* 173; *Thompson v. Morgan*, 3 *Camp.* 101.

*Form of Common Counts.*] In these counts there is no prefatory inducement; and they commence by stating generally the executed consideration, viz. that the def't. was indebted to plt. in a certain sum, on some executed consideration performed at def't.'s request; and that, being so indebted, he promised to pay the money, which payment is denied generally on the common breach, and there is usually no statement of special damage. In strict pleading, it has been said that these counts cannot be supported; but they have now been so long in use, that the courts would not listen to any objection against them. But little certainty is required in them. Time and place should be stated; but it does not seem necessary to state when and where def't. was indebted; *Emery v. Fell*, 2 *T. R.* 28; *Desborough v. Kelly*, 1 *Ld. Raym.* 533. A variance as to the time and place when and where def't. is stated to have been indebted, is immaterial; when there is a special count preceding these counts, it is usual and proper, though not essentially necessary, in the first common count, to lay the day after the special cause of action was complete; and, in the subsequent counts, to refer to the last-mentioned day: *Frampton v. Coulson*, 1 *Wils.* 33. It is usual and proper, in an action by or against executors, &c., to state that def't. was indebted before or after the death of the testator, &c. The sum in which def't. is stated to have been indebted need not be the precise one, but it should be enough to cover the real demand: *Step. Pl.* 318; 2 *Saund.* 122, *n.* 2. It must be stated that def't. promised to pay a specific sum, or so much as the plt. reasonably deserved; averring in the latter case what



sum is due: *Blakey v. Dixon*, 2 B. & P. 321. Under the *indebitatus count*, the plt. may recover what may be due to him, although no specific price or sum was agreed on; and, therefore, it has been observed, that the *quantum meruit* and *quantum valebant counts* are in no case necessary, and should in many cases be omitted, to prevent prolixity and expenso, 2 Saund. 122, n. 2; and it is settled that, under a *quantum meruit count*, the plt. cannot recover, if the goods were sold, &c. at a specific price: *Weaver v. Burroughs*, 1 Str. 648; 1 Chit. Pl. 301; *sed vide Laing v. Fidgeon*, 6 Taunt. 108. If the count be for the value of goods or chattels, such value should be described; and, therefore, where the plt. declared in *indebitatus assumpsit* for five hundred quarters of wheat for toll, the declaration was held bad, on special demurrer, for not stating the value of the corn: *Mayor, &c. of Reading v. Clarke*, 4 B. & A. 268; *E. of Falmouth v. Penrose*, 6 B. & C. 385. The contract, or cause of action, must be shown; but it is sufficient to state it by any general words, so that it may appear to the court, that it is not a debt of record or specialty, or only a simple contract, *Carth. [\*138]* 267; therefore, it is not \*necessary to show the particular work done, or the quantity, or quality, or value of the goods sold, &c., 2 Saund. 350, n. 2, 1 Chit. Pl. 301, *Spark v. Jobber*, 2 Ld. Raym. 1451; and it is sufficient if the count disclose enough respecting the contract, that a recovery in one action may be a bar to any future action for the same debt. It will be bad if plt. entirely omit to show for what cause the debt became due: *Woodford v. Deacon*, Cro. Jac. 206, 245. The quality, quantity, or value of the goods sold is never specified. It is essential in every common count, except those for money had and received, and on an account stated, to allege that the executed consideration arose at the deft.'s request; and an omission in this respect is fatal, after judgment by default: *Hayes v. Warren*, 2 Str. 933; 1 Saund. 264; 1 Roll. Ab. 11; *Bosden v. Thyn*, Cro. J. 18. Unnecessary statements, especially of matter of description, should be avoided, as a variance would sometimes be fatal; such as describing the local situation of the premises in an action for use and occupation: *Wilson v. Clarke*, 1 Esp. Rep. 273; *Ditchburn v. Spracklin*, 5 Esp. Rep. 31, 32; *King v. Fraser*, East, 348. Several distinct debts or contracts may be included in one common count; and the plt. will succeed, *pro tanto*, though he only prove one of such contracts: 2 Saund. 122, n. 2; *Rooke v. Rooke*, Cro. J. 245. Where the debt is small, or conciseness is an object, this should be attended to.

*Several Counts, Joinder of Counts, and Common Conclusion in.*] Observations on these points will be found collected, *post*, "Declaration."

PLEA.—As to pleas in general, *post*, "Pleas." As to pleas in abatement, *ante*, "Abatement."

*When necessary to plead Specially.*] If the defence in bar of the action consist of matter which shows the plt. had never any cause of action, the deft. need not plead such matter specially, but may give it in evidence under the general issue, *non assumpsit*; and he may also, un-

der the same plea, give in evidence most matters which go in *discharge* or *release* of the deft.'s liability, showing that the plt., at the commencement of the suit, had no subsisting cause of action: 1 *Chit. Pl.* 419; *Brown v. Cornish*, 1 *Ld. Raym.* 217; *Paramore v. Johnson*, *ib.* 566. As, if the matter of defence admits such a contract as that stated in the declaration was made, but denies that it is obligatory on the deft., as that another person ought to have been made co-plaintiff, or that deft. was incapacitated from contracting, or that contract was illegal, or that plt. has released it, or altered it, or not performed a condition precedent, or that deft. has performed it, or that it has become illegal or impossible to perform it; such matters may be given in evidence under the general issue: 1 *Chit. Pl.* 417. See the different titles of defences throughout this work. If the deft. insists that no such contract as that stated in the declaration was in fact made, he *must* plead the general issue: 1 *Chit. Pl.* 417. And, in general, matter of defence, which arises after action brought, must be pleaded specially, and cannot be given in evidence under the general issue: *Holland v. Jourdine*, *Holt*, 6; *Francis v. Crywell*, 5 *B. & A.* 886; 1 *D. & R.* 546, *s. c.*; *Lee v. Levy*, 4 *B. & C.* 390; 6 *D. & R.* 475; *Page v. Beaver*, 4 *B. & A.* 345.

The deft. *may* plead specially, either with or without the general issue, any matter which does not amount to the general issue, and which admits that in fact a contract was made, but insists that it was void or voidable, as on account of deft.'s infancy, &c., 1 *Chit. Pl.* 421; or that it has been discharged by release, &c. See the various instances as to when deft. may plead a special plea under the different titles of defences throughout this work. When deft. may plead specially, it is in general advisable so to do, especially if plt. can or is expected to set up various answers to the defence, which he cannot do under his replication to a special plea; and so, if \*def. relies on matter as mat- [\*139] ter of estoppel, he should plead it specially, as in the case of a judgment recovered: *post*, "*Judgment*."

The deft. *must* plead specially some matters of defence; as, alien enemy, deft.'s bankruptcy, tender, set-off, statute of limitations, &c.: 1 *Chit. Pl.* 439, 420. See the different titles of defence throughout this work.

*Form of Plea.*] The general rules as to pleas here apply: *post*, "*Pleas*." The general issue in form denies the undertaking or promise in manner and form, as stated in declaration. The omission of the usual words, "or promise," does not render the plea a nullity: 3 *D. & R.* 621. A plea of not guilty only is bad on demurrer, though aided by verdict: *Marshall v. Gibbs*, 2 *Str.* 1022; *C. T. Hardw.* 173. A plea of *nil debet* is a mere nullity: *Barnes*, 257; *Brennan v. Egan*, 4 *Taunt.* 165. As to the forms of special pleas, see the various titles of defences throughout this work.

REPLICATION, &c.] The rules as to replication and the subsequent pleadings in general here apply: *post*, "*Replication*," "*Rejoinder*," "*Sur-rejoinder*," &c. "*New Assignment*," "*Rebutter*," &c. To the

general issue the plt. can only reply the similiter. As to the replication to a special plea, see the various titles of defences throughout this work.

### *Precedents.*

See form of præcipe, and declaration thereon, and notes, *post*, "*Præcipe*."

The forms as of the commencement and conclusions of declarations in general, and in particular counts, and by and against particular persons, will be found, *post*, "*Declaration*;" they will here apply, adding, after the words, "of a plea," the words, "of trespass on the case upon premises," but even this is superfluous: *Plead. Ass.* 292; *Lord v. Houstome*, 11 *East*, 62, 5.

The forms of special counts in assumpsit will be found under the various titles of actions throughout the work: see the notes on *ante*, 111 to 136.

#### FORM OF COMMON INDEBITATUS COUNT.

For that whereas (or, if this be not the first count, say and whereas also), the said deft. heretofore, to wit, on the first day of January, 1828 (the precise day is quite immaterial, *ante*, 137: if this be not the first count, or first common count, or the plt. has not before stated any other day, say, afterwards, to wit, on the day and year aforesaid, or, if there be a day before mentioned, and plt. refers to that day, say, last aforesaid), at Westm. in the county of Middx. (or, at Westm. aforesaid, in the county aforesaid), was indebted to the said plt. in the sum (or, further sum) of £100 (any sufficient sum), of lawful money of Great Britain (or, if such money has already been mentioned, say, like lawful money), for, &c. (the subject matter of the claim must here be stated: see the various precedents to be found in the titles throughout this work), and at his special instance and request, and, being so indebted, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year (last) aforesaid, at Westm. aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said plt., to pay him the said last-mentioned sum of money, when he, the said deft. should be thereunto afterwards requested.

#### FORM OF A QUANTUM MERUIT.

And whereas also, afterwards, to wit, on the day and year (last) aforesaid, at Westm. aforesaid, in the county aforesaid, in consideration that the said plt., at the like special instance and request of the said deft., had, before that time, &c. (Here insert the subject matter of debt, as in the various precedents throughout the work, and then proceed as follows:)

He, the said deft. undertook, and then and there faithfully promised the said

[\*140] plt., to pay him so much money\* as he therefore reasonably deserved to have, of the said deft., when he, the said deft., should be thereunto afterwards requested.

And the said plt. avers, that he therefore reasonably deserved to have of the said deft. the further sum of £100 (any sufficient sum) of like lawful money, to wit, at Westm. aforesaid, in the county aforesaid; whereof the said deft., afterwards, to wit, on the day and year (last) aforesaid, there had no notice.

#### FORM OF QUANTUM VALEBANT.

(Same as the above quantum meruit to the asterisk, and then proceed as follows:.) As the said last-mentioned goods, wares, and merchandise (according to the claim), at the time of the said sale and delivery thereof were reasonably worth, when the said deft. should be thereunto afterwards requested. And the said plt. avers, that the said last-mentioned goods, wares, and merchandises, at the time of the said sale and delivery thereof, were reasonably worth the further sum of £100, of like lawful money, to wit, at Westm. aforesaid, in the county aforesaid; whereof the said deft., afterwards, to wit, on the day and year last aforesaid, there had notice.

See the forms relating to the character in which the plt. sues or is sued, *post*, "*Partners*," "*Executors*," "*Husband and Wife*."

## GENERAL ISSUE, NON ASSUMPSIT.

In the K. B. (or C. P. or Exchequer.) — Term, 8 Geo. 4.  
*John Nokes* } And the said deft., by —, his attorney, comes and defends the wrong and  
 ats. } injury, when, &c., and says, that he did not undertake or promise, in manner  
*John Styles.* } and form as the said plt. hath above complained against him. And of this the  
 said deft. puts himself upon the country.

For forms of other pleas in assumpsit, see the various titles of defences throughout the work.

*Evidence for Plaintiff.*

*Under the GENERAL ISSUE.]* Under this plea, the plt. must prove in substance all the material averments in the declaration: viz. the inducements, contract, or agreement itself; that it was made with the plt.; that it was made by deft.; that it was founded on a sufficient and legal motive, inducement, or consideration; that the subject-matter of it was to perform some legal act, or to omit to do something, the performance whereof is not enjoined by law; that the plaintiff has performed all conditions precedent, and, if necessary, given deft. notice of an act, or requested him to perform the contract; that deft. has not performed it; and, lastly, the damages.

*Proof of Inducements.]* If there be a special inducement stated in the declaration, the same must, if material to the action, be proved. A material variance between it and the proof would be fatal: see *ante*, 113.

*Proof of the Contract or Agreement itself.]* The mode of proving this will depend on the mode in which the contract or agreement was entered into. The best evidence must be given of which the nature of the case is capable: *B. N. P.* 293.

If the contract or agreement was by *express* words, the same must be proved by witnesses present when such were uttered, *post*, "*Witnesses*;" or by witnesses who have heard the deft. admit the contract or agreement was made: *ante*, "*Admissions*." As to when the contract must have been in writing, *post*, "*Vendor and Purchaser*," "*Guarantee*," &c.

If the contract or agreement was *implied*, or, in other words, if it arise from certain acts of the party himself, from which a promise by him may reasonably be inferred, those acts should be proved:

*Powley v. Walker*, \*5 T. R. 373; *Lagh v. Hewitt*, 4 East, 154. [\*141]  
 As, where plt. sues upon a contract by the deft., as his tenant, to use the farm in a husbandlike manner, according to the customary course of good husbandry in that part of the country, the plt. must prove that the deft. occupied the lands in question as his tenant, and the custom of the country: *ib.* Where the alleged promise is a legal duty, resulting from the nature of the particular service the deft. has undertaken to perform, it suffices to prove the original undertaking: *Nelson v. Aldridge*, 2 Stark.

435. And, therefore, an executor who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person: *Rogers v. Price*, *Ex. 3 Yo. & Jew.* 28. It should be remembered, however, that promises in law exist only in cases where there is no special agreement between the parties: *Toussaint v. Martinnant*, *2 T. R.* 100; *Gwillim v. Stone*, *3 Taunt.* 433; *Temple v. Brown*, *6 ib.*; 60.

If the contract or agreement was in writing, the writing must be produced, *Brewer v. Palmer*, *3 Esp. Rep.* 213, properly stamped, if indeed a stamp be necessary, *post*, "*Stamps*;" and it must be proved to have been duly signed by deft.: *post*, "*Hand-writing*." In some cases, the production of the writing may be dispensed with: *post*, "*Secondary Evidence*." In some cases parol evidence is admissible to explain it: *post*, "*Parol Evidence*." The plt. must prove the contract or agreement in substance as stated in the declaration. A variance in any circumstance that is essential to the contract is fatal: *ante*, 119, also, as to variance in contract; *King v. Pippett*, *1 T. R.* 240; *Bristow v. Wright*, *Doug.* 665, *Gwinnet v. Phillips*, *3 T. R.* 646. If there has been any alteration in the agreement or contract, the plt. should be prepared to explain it: see *ante*, "*Alteration of Contract*."

It may as well be observed, that no contract or agreement can be raised by a mere affirmation in discourse, or by a mere offer or overture to enter into a contract or agreement not definitely and expressly assented to by both plt. and deft.: *1 Rol. Ab.* 6, *M. P.* 1; *Com. D. Action Assumpsit*, *F.* 2; *M'Iver v. Richardson*, *1 M. & S.* 557; *Gaunt v. Hill*, *1 Stark.* 10; *Morris v. Paton*, *1 C. & P.* 189; *Johnson v. King*, *2 Bing.* 270; *Chit. Cont.* 4. And, to constitute a sufficient binding contract or agreement, it ought to be so certain and complete that each party may have an action on it. There must be a mutuality in every contract and agreement. *Cooke v. Oxley*, *3 T. R.* 653. There seems, indeed, an exception to this rule; as, in a contract void against one party by the Statute of Frauds, yet it may be binding on the other who has complied with the statute, *Roach v. Wadham*, *6 East*, 306, *Allen v. Bennet*, *3 Taunt.* 169, *Thornton v. Kempster*, *5 ib.*, 788; or in the case of an infant's contract, who may always sue, though not be sued thereon: *Holt v. Clarencieux*, *2 Str.* 937; and see *Bloxsome v. Williams*, *3 B. & C.* 232. Where the contract is complete, it is binding, though it be agreed that one party shall have the option of disapproving of and determining it: *Humphreys v. Carvalho*, *16 East*, 45; *Adams v. Lindsell*, *1 B. & A.* 681. In the absence of an *express* promise or agreement between the parties, *Toussaint v. Martinnant*, *2 T. R.* 100, *Cutter v. Powell*, *6 ib.*, 320, the law will frequently imply one: as, if I engage a person to do any work, I impliedly engage to remunerate him, *Jewry v. Busk*, *5 Taunt.* 302, and he to use due care and skill: *Shiells v. Blackburne*, *1 H. Bla.* 158, 162; *2 Bla. C.* 443; *Chit. Cont.* 5, 6. If, in the absence of a husband abroad, I bury his deceased wife in a manner suitable to the husband's degree in life, the law will imply a promise by him to reimburse me: *Jenkins v. Tucker*, *1 H. Bla.* 90. Where an order is given previously to the delivery of goods to a bailee to deal with them in a particular manner, to which *he assents*, upon the receipt of

the goods, a duty arises on his part to deal with them according to the order previously given and assented to; and the law implies a promise by him to perform such duty: *Streeter v. Horlock*, 7 *Moo.* 287. And a promise may be implied from the invariable usage and custom of trade: *Raitt v. Mitchell*, 4 *Camp.* 149; *Yeats v. Pim*, 2 *Marsh.* 141; *Greaves v. Hepke*, 2 *B. & A.* 131. So, the custom\* of the country [\*142] will frequently raise an implied promise, as in the instance of way going crops: *Wigglesworth v. Dallison*, *Doug.* 201; *Senior v. Armytage*, *Holt, C.*, 197, ante, 141; *Boraston v. Green*, 16 *East*, 71; *Naylor v. Collinge*, 1 *Taunt.* 19; 1 *Meriv.* 15; *Webb v. Plummer*, 2 *B. & A.* 746. And, in many cases, where the deft. has committed a tort, the law raises an implied promise on the part of the deft. to remunerate plt. for any loss he may have thereby sustained; and "the plt. may waive his right to recover damages for the tort, and may say, (as in the case of harbouring an apprentice), that he is entitled to the labour of his apprentice," and may bring assumpsit to recover an equivalent for that labour; and it is not competent for the deft. to answer that he obtained that labour *not by contract*, but by wrong:" *p. Mansfield, C. J., Lightly v. Clouston*, 1 *Taunt.* 114. An implied promise cannot arise from a mere moral obligation: *Hawkes v. Saunders*, *Cowp.* 290; *Blight v. Page*, 3 *B. & P.* 294, n.; *Atkins v. Banwell*, 2 *East*, 506; *Chit. Cont.* 10. See further, as to implied contracts, *post*, "Warranty," "Landlord and Tenant."

*Proof that the contract or agreement was made with the Plaintiff.]*

It must be proved that the plt. was the person with whom the contract was made; or, in other words, that he was the party *legally* and really interested in it when made: *Skinner v. Stocks*, 4 *B. & A.* 437; *Ander-son v. Martindale*, 1 *East*, 497; *Daves v. Peck*, 8 *T. R.* 332; 1 *Saund.* 154. Proof of his having entered into by his agent will do: *post*, "Principal and Agent." Plt. having an equitable interest in a contract is not sufficient: therefore, a *cestui que trust* cannot sue: *Allen v. Jenlett*, *Holt, C.* 641. And, where a promise is made to A. to pay him a sum of money for the use or benefit of B., B. cannot sue, having no legal interest: the action should have been brought by A.: *Shaw v. Sherwood*, *Cro. E.* 729; *Cramlington v. Evans*, 2 *Vent.* 310; *Carth.* 5. But, if the promise had been with A. to pay B. a sum of money, A. or B. might sue: *Carnegie v. Waugh*, 2 *D. & R.* 277; 3 *B. & P.* 149, n.; *Comp. of Feltmakers v. Davis*, 1 *B. & P.* 101; *Phil-lips v. Baleman*, 16 *East*, 370; *B. N. P.* 133. And, in some cases, where a person has made a contract for the benefit of another, the latter may adopt it, and sue thereon: *Hagedorn v. Oliverson*, 2 *M. & S.* 485, 490. Where money in litigation between two parties was, by mutual consent, paid over to a person in trust for the party entitled, it was held that it could only be sued for, and recovered from the trustee, by the party entitled to it: *Ker v. Osborne*, 9 *East*, 378. But where A. gave a sum of money into the hands of B. to pay to C., and B. had not paid it over to C.; it was held that if C. had not consented to receive this sum of B., A. might countermand the authority, and recover it back from B. *Owen v. Bowen*, 4 *Carr. & Payne*, 93. And money deposited with a

stakeholder can only be recovered from him by the party legally entitled to it: *Pichard v. Bankes*, 13 *East*, 20; *Cotton v. Thurland*, 5 *T. R.* 405; *Aubert v. Walsh*, 3 *Taunt.* 277; *Smith v. Bickmore*, 4 *ib.*, 474. And, where a person, holding a bill of exchange in trust for another, commenced an action on it, and then became bankrupt, the deft. having escaped, the assignees brought an action for the escape, and recovered damages to the amount of the bill: it was held, that the person beneficially interested, and for whom the bankrupt held the bill in trust, might maintain an action for money had and received against the assignees for the amount thus recovered by them, allowing them the costs and expenses: *Randoll v. Bell*, 1 *M. & S.* 714. "When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the vendee as soon as they are sent off," *Fragano v. Long*, 4 *B. & C.* 222; and he being the person to whom they belong, the law implies the contract for the carriage to have been made by the vendee, who is therefore the proper person to sue for any negligence on the part of the carrier: *Dawes v. Peck*, 8 *T. R.* 330; 2 *Saund.* 47, *k.*; *Moore v. Hopper*, 2 *N. R.* 411; *Anderson v. Clarke*, 2 *Bing.* 20. But, if the property in the goods has not become vested in the vendee, he will have no legal interest in the contract to enable him to support an action of assumpsit: *Sargent v. Morris*, 3 *B. & A.* \*277; *Evans v. Marlett*, 1 *Ld. Raym.* 271; *King v. Meredith*, 2 *Camp.* 639. In some cases, agents beneficially interested in a contract may sue: *ante*, "*Agent, Actions by.*" As to actions by corporations, *post*, "*Corporation.*" If it appear that the plt. has no legal interest in the contract, he will be nonsuited. The plt. should be prepared to show his ability to sue, if it is supposed deft. will set up a defence denying it; such as bankruptcy, alien enemy, coverture, &c. See those titles.

The plt. must prove that he is the only person with whom the contract was made, or in whom the legal interest in the contract was vested at the time of its being made: for all the parties in whom the joint legal interest in a contract is vested must join in the action; and this though the contract was made with several, or was in its terms joint and several: *Eccleston v. Clipsham*, 1 *Saund.* 153; *Withers v. Bircham*, 3 *B. & C.* 254; 6 *D. & R.* 106; *Anderson v. Martindale*, 1 *East*, 497, 501. Therefore, where plt. sued as principal of Furnival's Inn Society, on an account stated with him for money due to him and the seniors of the society, it was held bad in arrest of judgment, for, *per cur.*—"A promise to one is a promise to all, and all of them must join; for the debt upon the account stated arises to so many particular persons:" 7 *Mod.* 116. And, where the plts. make a payment in one sum, and as a joint payment, they must join in an action to recover the money so paid, &c.: *May v. May*, 1 *C. & P.* 44. Where bail called together upon an attorney, and employed him to surrender their principal, they must both join in action against the attorney for neglecting to effect the render pursuant to his undertaking: for the retainer being joint, by reason of the bail being mutually responsible for each other, and the act to be done operating equally in favour of each, a joint undertaking would necessarily be implied: *Hill v. Tucker*, 1 *Taunt.* 7, 9. So, where the separate cattle

of A. and B. were distrained, and C., in consideration of £10 paid him by them jointly, promised to have their cattle re-delivered to them, the court held that A. & B. should join in the action, because the contracts were joint: "it not being known how much the one gave, and how much the other:" 1 *Rol. Ab.* 31, *pl.* 9; *Sty.* 156-7, 203. Though it is competent to parties, in forming a company, to enter into an agreement that two of the members may sue, yet no subsequent alteration, without the consent of the member to be sued, can give a right of action to only one of the company: *Davies v. Hawkins*, 3 *M. & S.* 488. But, where several persons jointly interested agreed to horse a coach, each of them one stage on a road, and that, in case of default, one of them should sue the defaulter for a penalty, which should be divided amongst the non-defaulters, but in which deft. should have no interest, it was held, an action would lie on the agreement against the defaulter by the party so appointed to sue, and that the others need not be joined: *Radenhurst v. Bates*, 3 *Bing.* 463. If the cause of action and legal interest of the plt. in the contract is several, he need not join any other party, though the words of the contract made such party jointly interested: *Anderson v. Martindale*, 1 *East*, 497; 1 *Saund.* 153, *n.* 1; 1 *Chit. Pl.* 6. And, in case of a joint interest, if two or more have paid their shares, the third may, in respect of such severance, sue alone for his proportion: *Garrett v. Taylor*, 1 *Esp. D.* 117. And, when a contract is expressly made with one partner only, and deft. did not, at the time of the contract, know there were other partners, that one may sue: as, where one of several joint owners of a ship engaged in the whale fishery made the contract with the deft., who did not know at the time that others were concerned, it was held, that the action lay either by the party with whom the contract was actually made, or in the names of all the parties really interested: *Skinner v. Stocks*, 4 *B. & A.* 437; *Parsons v. Crosby*, 5 *Esp. Rep.* 199. A mere nominal partner, who has no legal interest, need not be joined, *Glossop v. Colman*, 1 *Stark.* 25, *Guidon v. Robson*, 2 *Camp.* 302, *Teed v. Elworthy*, 14 *East*, 210, *Dubois v. Ludert*, 1 *Marsh.* 246, \**Davenport v. Rackstrow*, 1 *C. & P.* [\*144] 89, 1 *Chit. Pl.* 7; nor need an infant, 1 *Stark.* 25, or dormant partner, *Burge v. De Tastet*, 3 *Stark.* 53, *Lloyd v. Archborole*, 2 *Taunt.* 324, 5; *sed vide* 1 *Marsh.* 246. But plt. should be prepared to prove the fact of such party being a mere nominal or dormant partner, or an infant: *post*, "Partners," "Infant." If the contract is made with others who are not, but ought to be, joined, it will be ground of nonsuit on the trial, 1 *Saund.* 291, *f.*, *Snelgrove v. Hunt*, 2 *Stark.* 424, 1 *Chit. Rep.* 74, *s. c.*, or for a plea in abatement, *Com. D. Abt. E.* 12; and, if the defect appear upon the pleadings, the deft. may take advantage of the nonjoinder on writ of error, *Slingsby's case*, 5 *Co.* 18, *b.*, 1 *Saund.* 154, *a.*, *Leglise v. Champante*, 2 *Str.* 820, *Vernon v. Jefferys*, *ib.* 1146, *Bull. N. P.* 158, *Cabel v. Vaughan*, 1 *Vent.* 34, *Skin.* 401; or he may demur, or arrest the judgment: 1 *Saund.* 291, *f.*, 154, *a.*; 2 *Str.* 820; *ib.* 1146; *Scott v. Godwin*, 1 *B. & P.* 75. The omission will be a ground for nonsuit, though the party be dead: *Jell v. Douglas*, 4 *B. & A.* 374.

In an action by several plaintiffs, it must be proved that the contract



was in terms made with them, or that their legal interest in it was *joint* at the time it was entered into, otherwise they should have sued separately: *Brand v. Boulcott*, 3 B. & R. 235; *Osborne v. Harper*, 5 East, 225. See the instances, *post*, "*Partners, Actions by.*" If persons join as plts. in the action who should not, it will be good cause of nonsuit at the trial, *Brand v. Boulcott*, 3 B. & P. 235; or it is cause of abatement, *Com. D. Abatement*, E. 12. ante, 14; or if the objection appear upon the face of the declaration, the deft. may demur generally, 2 Saund. 115, *Ward v. Branston*, 3 Lev. 363; or move in arrest of judgment, 1 B. & A. Ab. 31; or bring a writ of error, *ib.*

When the assignee of a contract sues, he must prove an express promise to, or contract with him, to perform the contract, in consideration of forbearance, or in respect of some other new consideration, according to the facts stated in declaration: 1 Saund. 210, n. 1; *Innes v. Dunlop*, 8 T. R. 595; *Surtees v. Hubbard*, 4 Esp. Rep. 204. A contract being a chose in action, is not assignable at common law, so as to entitle the assignee to maintain actions in his own name; and the assignee must, therefore, proceed in the name of the assignor, *Brooks v. Sowerby*, 3 Moore, 184, *Master v. Miller*, 4 T. R. 340-1, *Splitt v. Bowles*, 10 East, 281; or, in case of his death, in his representative's, *Seddon v. Senate*, 13 East, 73, 4 T. R. 340; and, even though the assignor has become bankrupt, the action must be in his name, and not in that of the assignee of such bankrupt, as he is only entitled to sue a contract wherein the bankrupt was beneficially interested: *Carpenter v. Marne*, 3 B. & P. 40; *Arden v. Watkins*, 3 East, 320; 10 East, 279. So, in the case of a composition-deed, an action thereon should in general be in the name of the debtor, and not the trustee: 1 Chit. Pl. 11. There may be a change of credit, by agreement, between the parties, proof of which will entitle the plt. to recover though he be not the original contractor with deft.: thus, "Suppose A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover that sum against A." *Tatlock v. Harris*, 3 T. R. 180; p. *Buller, J.*, *Hodgson v. Anderson*, 3 B. & C. 855; 5 D. & R. 735; *Wharton v. Walker*, 4 ib. 166. It is absolutely necessary in this case, that B.'s debt should be *extinguished* by the arrangement, *Wilson v. Coupland*, 5 B. & A. 228, *Wharton v. Walker*, 4 B. & C. 163, *Spratt v. Hobhouse*, 4 Bing. 173; and which is not so, unless there be a communication between all the parties, and an express agreement by the plt. to accept the deft. as his debtor only: *Wharton v. Walker*, 4 B. & C. 163. As to form of action in such case, *post* "*Money Had and Received.*" In such a case, deft. cannot object to the want of consideration between plt. and his debtor: *Griffith v. Young*, 12 East, 313, 5. In some cases, by express legislative provision, and in others by the custom of merchants, the assignee of a chose in action [\*145] may sue: *post*, "*Bond,*" "*Bail-Bond,*" "*Replevin-Bond,*" "*Bastardy-Bond,*" "*Bill of Exchange,*" "*Judgment.*" On covenants running with the estate in land, an assignee may sometimes sue: *post* "*Covenant:*" so may assignees of a bankrupt, by operation of law; *post* "*Bankrupt.*"

In the case of a *surviving partner* or partners suing, the death of the deceased partner must be proved; *post*, "*Death*," "*Parish Register*," and, as to how partners should in general sue in the case of the death of a partner, *post*, "*Partners*."

In the case of an executor or administrator, or heir or devisee, suing, see the titles, *post*, "*Executor and Administrator*," "*Heir*," "*Devisee*," and, as to actions at the suit of assignees of a bankrupt, *post*, "*Bankrupt*;" or insolvent, *post*, "*Insolvent*;" or husband and wife, *post*, "*Husband and Wife*."

*Proof that the Contract or agreement was made by deft.*] The plt. must prove either that deft. himself, or his agent, actually made an *express* contract, or that there are facts from which the law will *imply* deft.'s contract, *ante*, 141. Thus, it has been held that a captain of a troop, while absent, was not liable for subsistence furnished to the troop, though he derived a profit upon the subsistence-money, which had been paid by government, and though the troop still continued under his military orders, another officer, who had the actual command, having issued the orders for subsistence and received the subsistence-money: *Myrtle v. Beaver*, 1 *East*, 135; *Rice v. Chute*, *ib.* 579; *Young v. Brander*, 8 *East*, 10; 1 *Chit. Pl.* 23. And the seller of a ship, although deemed to be the legal owner at the time, was held not to be answerable for repairs, where the purchaser, in the interval elapsing between the inception and completion of his conveyance, ordered the master to take her to be repaired, which he did: *Young v. Brander*, 8 *East*, 10; *Fraser v. Marsh*, 13 *East*, 238. For the same reasons, an agent cannot in general be sued, *ante*, "*Agent, Actions against, by Third Persons*." As to the proof when deft. entered into the contract by his agent, see *post*, "*Principal and Agent*," If it be expected that deft. will set up the defence of incapacity to contract, such as his having been an infant, lunatic, under coverture, duress, drunkenness, &c., plt. should be prepared to disprove these facts: see those titles.

The plt. should be prepared to disprove that the deft. was a partner in the contract, if there be the slightest ground for such a defence, for a party cannot be plt. as well as deft. in an action, which would be the case, if he were suing a partner in the contract: *Mainwaring v. Newman*, 2 *B. & P.* 124, 2 *Chit. Rep.* 539; *Bosanquet v. Wray*, 2 *Marsh.* 319; 6 *Taunt.* 597, *s. c.* See further, *post*, "*Partners*," as to when they may sue each other, and the evidence in the action.

The plt. need not be prepared to prove that he has sued all the parties who contracted, as the *nonjoinder* of defts. cannot be taken advantage of at the trial: *ante*, 14.

The plt. should prove, in an action against two or more defts. that they *jointly* entered into the contract; otherwise plt. would be nonsuited, if it does not appear on the pleadings that they did not jointly contract: *Shirreff v. Wilks*, 1 *East*, 52; *Porter v. Harris*, 1 *Lev.* 63; *B. N. P.* 129; *Siffkin v. Walker*, 2 *Camp.* 308; *Max v. Roberts*, 12 *East*, 94; *Wraill v. King*, *ib.* 454; 1 *Chit. Pl.* 34. Therefore, in an action against three, two only of whom were liable to be sued, and the party not liable, together with one of those who was liable, suffered judgment

by default, and the other party pleaded the general issue, it was held nevertheless necessary that plt. should prove they all three jointly contracted, 1 *East*, 52, and see *Hanway v. Smith*, 3 *T. R.* 662; and so, where the plt. sued on a joint and several promissory note, against all the makers jointly, and one of them, by his plea, admitted his [\*146] handwriting to the note, but \*the other defts. pleaded *non assumpsit*, the plt. was nonsuited, for not proving the handwriting of the deft., who, by his plea, had so admitted it: *Gray v. Palmer*, 1 *Esp. Rep.* 135. When one of several defts. is discharged from liability by matter *subsequent* to the making of the contract, as by his bankruptcy and certificate, &c., the failure on the trial as to him on such grounds does not preclude the plt. from recovering against the other parties, and should the deft. avail himself of his want of liability, by pleading his certificate, plt. may enter a *not. pros.* as to him, and proceed against the rest, *Noke v. Ingham*, 1 *Wils.* 89, 1 *Saund.* 207, *a.*, *Chandler v. Parkes*, 3 *Esp. Rep.* 77; but, where the contract has, in fact, been made by all the defts., yet, in point of law, is not binding on some or one of them, by reason of their not having been originally liable, as from infancy, coverture, &c., it will be a ground of nonsuit if such such party be joined, 3 *Esp. Rep.* 77, 1 *Chit. Pl.* 35; and plt. cannot cure the defect by entering a *nolle prosequi*: as to him, *ib.*, but must commence a fresh action against the rest only: *Burgess v. Merrill*, 4 *Taunt.* 468; *Gibbs v. Merrill*, 3 *ib.* 307; *Teed v. Elworthy*, 14 *East*, 214; *Jaffray v. Black*, 5 *Esp. Rep.* 47. If the action is founded on a tort, as in debt on a penal statute, or the like, the joinder of too many defts. is no ground of objection: *Carth.* 361: *post*, “*Carriers.*” And the joinder of too many defts., executors, is no ground of objection: 1 *Saund.* 207, *a.*: *post*, “*Executors.*” If it appear upon the face of the pleadings, that too many persons are made defts., deft. may demur generally, or move in arrest of judgment, or bring a writ of error: *Mansell v. Burridge*, 7 *T. R.* 352. As to the mode of proving a joint contract, *post*, “*Partners.*”

In an action against a *surviving partner*, there is no occasion to prove the death of the deceased partner, nor is it necessary to prove that the deft. jointly contracted with him, if, indeed, the plt. does not declare against him as surviving partner.

If the action be against the *assignee* of a contract, the plt. must prove a fresh agreement, founded on consideration entered into between him and the deft., and as stated in the declaration, 3 *B. & C.* 855, 4 *B. & C.* 163. *Anstey v. Marden*, 1 *N. R.* 124, *Evans v. Drummond*, 4 *Esp. Rep.* 91, *Reed v. White*, 5 *Esp. Rep.* 122, *Tapley v. Martens*, 8 *T. R.* 451, *Boddenham v. Purchas*, 2 *B. & A.* 39, *Wilson v. Coupland*, 5 *E. & A.* 228, *Israel v. Douglas*, 1 *H. Bla.* 238, 1 *Chit. Pl.* 37, *ante*, 144; for, in general, in the case of a mere *personal* contract, the action for the breach of it cannot be brought against a person to whom the contracting party has assigned his interest, and the original party alone can be sued: *ib.* 1 *Chit. Pl.* 36. Proof that the deft. is the endorsee of a bill of lading, requiring the delivery to order, on payment of freight, renders him liable: *Bell v. Kymer*, 1 *Marsh.* 146; *Pinder v. Willes*, *ib.* 250; *Wilson v. Kymer*, 1 *M. & S.* 157. Proof that the

deft. (who was the consignee or purchaser of goods) accepted the goods, in pursuance of the usual bill of lading, will render him liable for the freight, unless he was the mere agent of the consignor, and that was known to the plt. or master of the ship: *Ward v. Felton*, 1 *East*, 507; *Pinder v. Wilks*, 1 *Marsh*. 248. In the case of covenants running with the land, which concern real property or the estate therein, the assignee of such covenant may sometimes be sued: *post*, "*Covenant*."

The proofs for plt. in actions against executors, &c., bankrupts, assignees of bankrupts, insolvents, husband and wife, will be found under their respective titles; *post*.

*Proof of the Motive, Inducement, or Consideration for the Contract.*] The plt. must prove that the contract was founded on a sufficient and legal motive, inducement, or consideration; and this though the contract was in writing, *Rann v. Hughes*, 7 *T. R.* 350, *n.*; or the contract is void, and no action can be maintained on it: 2 *Bla. C.* 444; *Chit. Contr.* 7. \*In actions on bills of exchange and [\*147] promissory notes, this is not, in general, necessary: *post*, "*Bills of Exchange*." The consideration must be proved, as stated in the declaration, or a variance would be fatal, *ante*, 114; and see the various instances under the different titles throughout this work.

A consideration is sufficient if it arise "from any act of the plt., from which the deft., or a stranger, derives a benefit or advantage, however small, if such act is performed by the plt. with the consent, express or implied, of the deft.," 2 *Saund.* 137, *e.*; *Longdridge v. Dorville*, 5 *B. & A.* 122; or by reason "of any damage, or any suspension or forbearance of plt.'s right at law or in equity; or any possibility of a loss occasioned to the plt. by the promise of another, although no actual benefit accrues to the party undertaking:" 1 *Saund.* 211, *c.* It is not essential that the consideration should be adequate in point of actual value, as the law does not weigh the quantum of the consideration, having no means of deciding upon this matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract, and the agreement violate no rule of law. It is sufficient that a slight benefit be conferred by the plt. on the deft., or a third person, or even if the plt. sustain the least injury, inconvenience, or detriment, or subject himself to any obligation, *Pillans v. Mierop*, 3 *Bur.* 1672, &c., *Bates v. Cort*, 2 *B. & C.* 474, without benefiting the deft. or any other person: *Chit. Contr.* 7; *Sturlyn v. Albany*, *Cro. El.* 67; *Com. D. Assumpsit, B.*; *Jones v. Ashburnham*, 4 *East*, 463; *Bunn v. Guy*, *ib.* 194; *Williamson v. Clements*, 1 *Taunt.* 523; *Phillips v. Bateman*, 16 *East*, 372; *Richardson v. Mellish*, 2 *Bing.* 242; *Whitehead v. Greetham*, *ib.* 464; *Morley v. Boothby*, 3 *ib.* 112, 113. An undertaking to pay if deft. will prove his debt, is a sufficient consideration for the deft.'s promise, *Sid.* 57, and see *Sturlyn v. Albany*, *Cro. El.* 67; but the mere undertaking to pay the debt of a third person is not sufficient, if there be no new consideration, as forbearance, &c., 1 *Roll. Ab.* 27, *pl.* 49, and credit was not given at the promisor's

request: *Fell, Merc. G.* 39, 40, 240. The mere delivery by the plt. to the deft. of the goods of the former, is a sufficient consideration for the deft.'s promise to account for and take care of the same: *Coggs v. Bernard*, 2 *Ld. Raym.* 819. It is a sufficient consideration for a promise, that plt. undertook to *endeavour* to perform any act at the deft.'s request, *Goring v. Goring*, *Yelv.* 11, *Hob.* 105, *Bohenham v. Thacker*, 2 *Vent.* 71, 74, *Com. D. Assumpsit*, *B.* 5; but the endeavour must be proved to support the action. An agreement to refer to arbitration, to settle boundaries, to prevent litigation, is sufficient: 1 *Ves.* 23; *Com. D. Action on Case on "Assumpsit," Longdridge v. Dorville*, 5 *B. & A.* 117. The relinquishing a claim to a doubtful title, *Thornton v. Fairlee*, 2 *Moo.* 406, the written assignment by the plt. to the deft. of a mere parol agreement between the former and a third person, for the sale of a house to the plt., the benefit whereof the deft. receives accordingly, *Seaman v. Price*, 2 *Bing.* 437, are sufficient considerations. A waiver of a tort, from which the deft. derived a benefit, is a sufficient consideration for a promise by him, *Hill v. Perrott*, 3 *Taunt.* 274, *King v. Langham*, 2 *T. R.* 145, *Reed v. James*, 1 *Stark.* 134, *Gill v. Kymer*, 5 *Moo.* 525; and even in cases where no loss was sustained by the plt., *Davis v. Morgan*, 4 *B. & C.* 12. The consideration, however, must not be wholly worthless; therefore, a promise to forbear "for a little while" has been held not to be a sufficient consideration, 1 *Bulst.* 41; see further, *post*, "*Forbearance*." The mere doing that which the plt. was bound in law to perform, is not a sufficient consideration; therefore, a promise to pay witness for loss of time is not sufficient, the witness being bound by subpoena to attend: *Willis* [\*148] *v. Peckham*, \*1 *B. & B.* 515, 4 *Moo.* 300, *s. c.*; *Moor v. Adam*, 5 *M. & S.* 156; and see *Harris v. Watson*, *Peake's Rep.* 72; *Brown v. Crump*, 1 *Marsh.* 567; *Newman v. Walters*, 3 *B. & P.* 612; *Dafter v. Cresswell*, 2 *C. & P.* 161. A mere moral obligation to pay a debt, or perform a duty, is a sufficient consideration to support an *express* promise, although no legal liability existed at the time of making such promise, *Hawkes v. Saunders*, *Cowp.* 290, *Wen-nall v. Adney*, 3 *B. & P.* 249, *n.*, *Atkins v. Banwell*, 2 *East*, 506; or although no legal responsibility ever existed: *Seaman v. Price*, 2 *Bing.* 437; *Hyeling v. Hastings*, 1 *Ld. Raym.* 389. But, in these cases there must be a strict and undoubted moral consideration: *Harris v. Watson*, *Peake's Rep.* 72; *Brown v. Crump*, 1 *Marsh.* 567; *Willis v. Peckham*, 1 *B. & B.* 515. Natural affection only is not a sufficient consideration: *Brett v. J. S.*, *Cro. El.* 756, 3 *B. & P.* 249, *n.* If the consideration be such that it was utterly impossible, in fact or law, to be performed, it is insufficient, 5 *Vin. Ab.* 110, 111, 1 *Rol. Ab.* 419, *Harvy v. Gibbons*, 2 *Lev.* 161, *Toutting v. Hubbard*, 3 *B. & P.* 296, *n.*; *Nerot v. Wallace*, 3 *T. R.* 22, *Seaman v. Price*, 2 *Bing.* 437; but, if the performance of the consideration be merely improbable or difficult, *Co. Lit.* 206, *a. n.* 1, 179, *a.*, *Thornborow v. Whitacre*, 2 *Ld. Raym.* 1114, *Chit. Con.* 14, or impossible only with regard to the party to perform it, or he might legally and in fact cause it to be performed by others, it will be sufficient, *ib.* 3 *Chit. Com. L.* 100; as to the statement of the consideration, *ante*, 115.

A consideration is *legal* if it be not repugnant to the revealed law of God, to the general policy of the common law, or to some legislative provision: *Lightfoot v. Tenant*, 1 B. & P. 554; 1 *Fonbl.* 345. Illegal considerations may be distinguished in three heads: 1. The doing an act *malum in se*, or *malum prohibitum*; 2. the omission of the performance of a legal duty; and, 3. a stipulation encouraging such crime or omission: 1 *Bla. C.* 57; *Co. Lit.* 206, b. n. 1; *Lloyd v. Johnson*, 1 B. & P. 340. They are either void at common law or by statute. Those void at common law and some by statute, and the consequent defences arising thereon, will be considered, *post* "*Illegal Consideration*." The rest of those which are void by statute, and the consequent defences arising on them, will be found under the various titles of "*Usury*," "*Gaming*," "*Horse-racing*," "*Stockjobbing*," "*Offices, Sale of*," "*Simony*," "*Election*," "*Sunday*."

The effect of the illegality of consideration will be more fully considered, *post*, "*Illegal Consideration*." It may, however, be here observed, that if only a portion of the consideration, or subject matter of an agreement or promise, be invalid at *common law*, that part of it can be separated from the rest, and may be rejected, and the rest of the agreement or promise remain good; but, if any part of the consideration or subject matter of the contract be contrary to a statute, the whole will be bad; *Hob.* 14; 1 *Mo.* 35, 6; *post*, "*Illegal Consideration*."

Plt. must show that the consideration of the contract proceeded from the deft.'s express *request*, or that from which a request may be inferred, the necessity for which follows from the principle of law, that no one can constitute another his debtor without his permission: see 1 *Rol. Ab.* 11; 1 *Saund.* 264, n. 1; *Stokes v. Lewis*, 1 T. R. 20; *Hayes v. Warren, Str.* 933; *Sty.* 465; *Bourne v. Mason*, 1 *Vent.* 6. See *ante*, 141, as to when a contract may be inferred.

*Proof of the Subject Matter of the Contract.*] This must be proved; and the subject matter must be to perform some legal act, or to omit to do something, the performance whereof is not enjoined by law: *Lee v. Drake*, 2 *Salk.* 468; *Parsons v. Thompson*, 1 *H. Bla.* 322. The general principles as to the validity of the consideration of a contract will here apply; the stipulation of each party being in general the *consideration* for the others' performance.

\* *Proof of Performance of Condition Precedent.*] The [\*149] plt. must prove that he has performed every condition which is imposed on him by the terms of the contract, before he can call on deft. for a performance of the act, for non-performance of which the action is brought. We have already considered as to what constitutes a condition precedent, *ante*, 121 to 127; and proof must be adduced accordingly. A variance in the proof from the statement in the pleadings would be fatal: *ante*, 121.

*Proof of Notice to or Request on Defendant.*] We have already seen when it is necessary to aver in the declaration a notice to deft. of some act, or a request on him to perform one, before he can be sued for

a breach of the contract; and proof of it must be adduced accordingly: *ante*, 130; 132. The notice or request must be proved to have been made personally or by letter, and by the plt. or his agent. As to proof of demand by agent, *Squier v. Hunt*, 3 *Price*, 68.

*Proof of Breach.*] The plt. must prove deft.'s breach of the contract, as stated in the declaration, *ante*, 133; and this must necessarily depend on the particular nature of the action. See the different titles throughout this work. All the acts necessary to constitute a breach should be fully proved.

*Proof of Damages.*] The plt. must in all cases be prepared to prove the amount of the damages he has sustained; that they were sustained before action brought, or before the time when the declaration appears to have been filed: 2 *Saund.* 171, *n.* The nature of the proof must depend on the facts stated in the declaration, and whether the damages be for a mere pecuniary demand, or for a general and unliquidated one. In an action for not indemnifying plt. from his law expenses, which deft. undertook to pay if plt. would proceed in an action, it was held unnecessary to prove that plt. had actually paid his attorney the amount of such expenses, his being liable so to do being sufficient: *Bullock v. Lloyd*, 2 *C. & P.* 119. It may be as well observed, that though the statement of the damages be larger than the proof, it will not prejudice: *ante*, 135. The plt. will, at all events, be entitled to some, though nominal damages, if he prove the breach of contract. The jury cannot give higher damages than the amount laid in the declaration: *Cheveley v. Morris*, 2 *W. Bla. R.* 1300; *Tidd*, 927.

Where the action is brought for a *mere money demand*, a jury can hardly be warranted in giving more or less than the amount of that demand, if deft. does not by his defence show it may be reduced: *Bac. Ab. Damages*, D. 1; *James v. Morgan*, 1 *Lev.* 111. In some cases, interest will be added to the principal: *post*, "Interest."

Where the parties stipulate for a *liquidated sum* to be paid as damages, the jury are bound to give damages to the full amount of that sum: *Farrant v. Olmius*, 3 *B. & A.* 692; *Barton v. Glover*, *Holt*, C. 43, 46; *Lowe v. Peers*, 4 *Burr.* 2229. But, where they stipulate merely for a *penalty* to be paid, the jury may give less than the amount of such penalty; or if plt. does not proceed for the penalty, they may even give more: *Harrison v. Wright*, 13 *East*, 343; *Barton v. Glover*, *Holt*, C. 44; *Winter v. Trimmer*, 1 *W. Bla. R.* 395; but see *Wilbeam v. Ashton*, 1 *Camp.* 78. It should be observed, that, by proceeding for the penalty which plt. recovers, he cannot recover beyond that penalty: *ib.* With respect to what stipulation amounts to an agreement to consider the sum more as liquidated damages than a penalty, it has been said by *Heath, J.*, in *Astley v. Weldon*, 2 *B. & R.* 353: "It is very difficult to lay down any general principles in cases of this kind; but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large [\*150] sum is stated at the end to be paid upon \*breach of performance, that must be considered as a penalty; but where it is agreed

that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." And *Chambre, J.*, observed: "There is one case in which the sum agreed for must always be considered as a penalty, and that is where the payment of a smaller sum is secured by a larger." Where the word "penalty" is introduced, and there is no other term explaining it, it is in general clear that the sum is only to be treated as a penalty: *Smith v. Dickenson*, 3 B. & P. 630; *Harrison v. Wright*, 13 East, 345. On the other hand, where the words "liquidated damages," or their equivalent, are used, and there are no other explanatory words, the sum can scarcely ever be considered as a penalty: *Barton v. Glover*, *Holt*, C. 43. In deciding the point, however, the whole of the agreement, and the evident intention of the parties, must be regarded, *Davies v. Penton*, 6 B. & C. 222, 9 D. & R.; the courts always inclining to treat the sum rather as a penalty: *Holt*, C. 43. In a late important decision on this subject, where A. agreed with B. to sell him the good-will of A.'s business, and to demise him his house in which the business was carried on, for which B. was to pay £800, and to take furniture and fixtures at a valuation, and they were afterwards valued at £174, £400 was paid to A. at the time of executing the agreement, and B. agreed to accept and pay two bills of exchange, one for £400, payable twelve months after date, and the other for £174, payable two months after date, and A. agreed not to carry on the business within five miles of the house; and, for the true performance of this agreement, each of them did thereby bind himself to the other of them in the penal sum of £500, to be recovered for breach of the agreement in a court of law, as and by way of liquidated damages: it was held, that this sum was a penalty: *Davies v. Penton*, 6 B. & C. 216. And where it was agreed "by and between the parties, that either of them neglecting to perform this agreement according to the true intent and meaning hereof, shall pay to the other of them the full sum of £200, of lawful, &c., to be recovered in any of his majesty's courts of record at Westminster," the court held this more as an agreement for a penalty than liquidated damages: *Astley v. Weldon*, 2 B. & P. 346. On the other hand, where it was agreed between plt. and deft. that the latter should take an assignment of the house of the former, and that either party not fulfilling all and every part of the agreement, should pay to the other £500, "thereby settled and fixed as liquidated damages," the court held, that, on breach of the agreement, by omission to take an assignment, the deft. was liable to pay the whole £500, and that it was not a mere penalty: *Reilly v. Jones*, 1 Bing. 302; 8 Moo. 244, s. c. Where the agreement was, "I do hereby promise Mrs. C. L., that I will not marry with any other person besides herself: if I do, I agree to pay her £1000 within three months next after I shall marry any body else," it was held, that the sum specified formed the sole measure of damages, as fixed and liquidated between the parties: *Lowe v. Peers*, 2 Burr. 2225. A reservation of "£50 per acre for every acre converted into tillage, &c.," is in the nature of liquidated damages: *Farrant v. Olmius*, 3 B. & A. 692; 4 Burr. 2228; *Birch v. Stephenson*, 3 Taunt. 489. And so, where two persons agreed to perform certain work in a limited time, "or to pay a stipulated weekly sum for such



time afterwards, as it should remain unfinished," it was held, the jury must give such weekly payments, they being in the nature of liquidated damages: *Fletcher v. Dyche*, 2 T. R. 32.

Where the action is brought for the recovery of *general* and unliquidated damages, and not for a mere money demand, the amount of such damages is entirely in the province of the jury, who may take into consideration any consequential injury arising from the breach of the contract. If the damages given be excessive, the court will sometimes [\*151] times grant a new trial, *Tidd*, 940; but not so if they be too small; at least, it seems very unusual so to do, unless, indeed, in actions on mere money demands, or on inquisitions: *ib.*

With respect to what consequential damages the jury may take into consideration, they must be such as will be warranted by the fair, legal, and natural result of the breach of debt's agreement: *ante*, 136; *Vicars v. Wilcocks*, 8 East, 1; *Flower v. Adam*, 2 Taunt. 314. They must, if they be not the *necessary* result of such breach, appear upon the declaration, and be proved accordingly: *ante*, 136. If the buyer of a horse, with a warranty, relying thereon, re-sell him with a warranty, and, being sued thereon by his vendee, offer the defence to his vendor, who gives no direction as to the action, the plt. defending that action is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty: *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 431, s. c. And, it seems, in such action, the vendee would be entitled to the expenses of the horse's keep, if he prove he tendered back the horse in proper time: *Caswell v. Core*, 1 Taunt. 566. And, where the seller rescinded the contract, it was held he was liable for the keep from the time of the contract: *King v. Rice*, 2 Chit. Rep. 416. So, where the debt., a broker, contrary to the orders of the plt., his principal, purchased goods of an inferior quality, *per quod* one J. S., who had commissioned the plt. to purchase the goods for him, sued the plt. for the bad quality of the goods, and recovered damages and costs, it was held that the measure of damages was not the mere difference in price between the two kinds of goods, but the amount of the damages and costs recovered in the action against the plt.: *Mainwaring v. Brandon*, 8 Taunt. 202; 2 Moo. 125, s. c. The court, however, compelled the plt. to give this undertaking: namely, that he should assign the goods to the debt., or sell and account with him for the net proceeds thereof. Where the tenant, under a lease containing a covenant to repair, underlet the premises to a person, who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered, it was decided that the damages and costs recovered in that action, and also the costs of defending it, might be assessed as special damages in an action against the under-tenant, for the breach of his covenant to repair; and the court set aside an inquisition, by which only the damages paid by the plt. were awarded to him: *Neale v. Willie*, 3 B. & C. 533; 5 D. & R. 442, s. c. And, in an action for the breach of a warranty of a chain cable, the plt. may recover the value of the anchor to which the cable was attached, on proving that the cable was broken, and that the crew slipped it, in order to avoid danger: *Borradaile v. Brunton*, 2 Moo. 582; 8 Taunt. 535, s. c.; and see those cases in Chit.

*Cont.* 340, 1. In an action for breach of contract in not accepting goods sold to deft., plt. may, if he have legally resold the goods, recover damages to the amount of the difference in the price produced by the two sales, see *Mertens v. Adcock*, 4 *Esp. Rep.* 251; and, in some cases, warehouse-room, &c., *Greaves v. Ashlin*, 3 *Camp.* 427. Where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him: held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect: *Hopkins v. Grazbrook*, 6 *B. & C.* 31. On the other hand, where the vendor on a similar contract had some, though not a sufficient, title to the estate, and, on an objection being made to the title, offered to convey the estate with such title as he had, or to return the purchase-money with interest, it was held that no damages for the loss of the bargain were recoverable: *Flureau v. Thornhill*, 2 *W. Bla. R.* 1078, commented on in 6 \**B. & C.* 33; and see *Johnson v. John-* [\*152]  
*son*, 3 *B. & P.* 167, *Palm.* 364. In an action for not replacing stock, it is no legal damage that plt. was prevented completing an advantageous contract he had entered into: 1 *Chit. Pl.* 296. So, extra costs are not recoverable as special damage: *Hathaway v. Barrow*, 1 *Camp.* 151, 2; *Sinclair v. Eldred*, 4 *Taunt.* 7; *Webber v. Nicholas, M. & M.*; *Jenkins v. Biddulph*, 4 *Bing.* 160; and see other instances, *post*, "Case."

With respect to the measure of the damages, it has been held, in an action on warranty, if there has been no offer to return the goods warranted, the measure of the damages is the difference between the price fixed and the real value: *Caswell v. Coare*, 1 *Taunt.* 566; *Germaine v. Burton*, 3 *Stark.* 32. In an action of assumpsit for not delivering goods upon a given day, the measure of damages is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered; *Gainsford v. Carroll*, 2 *B. & C.* 524, 4 *D. & R.* 161, *s. c.* And this, though the vendor, in the interim, had resold and refused to complete, if the vendee did not assent to rescind the contract: *Leigh v. Paterson*, 2 *Moo.* 588, 8 *Taunt.* 540, *s. c.* And on a failure of a contract to replace stock, it seems, though the measure of damages is the price at the day when it ought to have been replaced, or at the day of the trial, at the option of the plt., *M<sup>r</sup>Arthur v. Seaforth*, 2 *Taunt.* 257, *Shepherd v. Johnson*, 2 *East*, 211; yet the highest price at any intermediate day cannot be given: 2 *Taunt.* 257. And if, after the appointed time to replace the stock, and while the market was rising, deft. offered to replace the stock, the criterion of damages would be the value of the stock at the time of the tender, and not the increased value at the time of the trial: 2 *East*, 211. Upon a contract to replace stock and pay dividends in the mean time, although the jury give damages for the value of the stock and the amount of the damages, yet, on affirmance of the judgment in error, the measure of increase is not the further damages that may

have accrued, but interest upon the damages given as the value of the capital stock : *Dwyer v. Gurry*, 7 Taunt. 14.

As to what deft. may prove in reduction of damages, *post*, 153.

*Under SPECIAL PLEA or DEFENCE.*] Where an issue is taken on a special plea, and the general issue is also pleaded, the plt. must not only be prepared to prove all that is required of him by the general issue, but also what is required of him in the issue taken on the special plea. When the special plea is pleaded without the general issue, so as to admit all the other facts but what are denied by such special plea, then no proof of such admitted facts need be adduced, see *ante*, 39, 40; and the proof will, in general, then consist of an answer to the special plea and the amount of damages.

With respect to when the burden of proving the issue lies on the plt., these general rules may be laid down : that the party who asserts the affirmative is bound to prove the issue, *Calder v. Ruthersford*, 3 B. & B. 302, *Ross v. Hunter*, 4 T. R. 33; that, when the presumption of law is in favour of the affirmative, it is not necessary for the party asserting it to prove the same, and the disproof of it lies on the other party, although it involve a negative, 2 *Sewol. N. P.* 709; that, when the issue involves a charge of culpable omission, the party making the charge must prove it, although he must prove a negative; for the other party shall be presumed innocent till proved guilty: 1 *Rol.* 83; *Williams v. E. I. Comp.* 3 *East*, 193, 9; *Rex v. Hawkins*, 10 *East*, 216. And, lastly, that where a party seeks to support his case by a particular fact which lies peculiarly within his own knowledge, the *onus* of proving such fact, though it involve a negative, will lie upon him : *Apoth. Comp. v. Bentley, R. & M.* 159; *Spieres v. Parker*, 1 T. R. 144; *Rex v. Stone*, 1 *East*, 650; see further, *post*, "Evidence."

\*The proofs under, and in answer to, a special plea of defence, [\*153] must necessarily depend on its nature and the particular issue taken; they will be found under the different titles of defences throughout the work: see those titles.

### *Evidence for Defendant.*

We have already seen under what plea deft. may avail himself of his defence, *ante*, 138; and the evidence should be adduced accordingly. We have also seen upon whom the burden of proving the issue lies, *ante*, 152.

*Defences.*] The usual defences consist in denying, or rather disproving, 1. the *plt.*'s ability to sue, as his being a bankrupt, alien enemy, under coverture, see those titles; or that he had no legal interest in the contract, *ante*, 142; or that others should have been joined with him in the action, *ante*, 143, *post*, "*Partners*;" or that too many parties, *plts.*, have sued, *ante*, 144, *post*, "*Partners*;" or that *plt.* is a mere assignee of the contract, *ante*, 144, and see what deft. may successfully show as a defence in this respect, in actions at the suit of executors and administrators, heirs, devisees, assignees of bankrupts, insolvents, and husband and wife, *post*, those titles. 2. The deft.'s inability to contract,

or personal protection from the contract sued on, as being an infant, *feme covert*, lunatic, or drunk, see those titles; or that he never entered into the express or implied contract, *ante*, 145; or that the defts., in an action against several, did not jointly contract, *ante*, 145, *post*, "*Partners*;" or that the plt. and deft. were partners in the contract sued on, *ante*, 145, *post*, "*Partners*;" or that he is a mere assignee of the contract, *ante*, 146, and as to what defences of this nature deft. may avail himself of, in actions against executors and administrators, bankrupts, insolvents, husband and wife, see those titles. 3. That the action is misconceived, and should not have been in assumpsit, *ante*, 109; or that it is brought too soon: *Mussen v. Price*, 4 *East*, 146; *Lee v. Risdon*, 2 *Marsh.* 495; *post*, "*Goods Sold*." 4. That the contract or consideration was not as that stated in the declaration, or what is proved in evidence, see *ante*, 114, 118, as to variance; or that it is not binding for want of a stamp, *post*, "*Stamp*;" or for want of consideration, *ante*, 147; or that the contract or consideration was illegal at common law or by statute, *post*, "*Illegal consideration*," and the various titles referred to, *ante*, 5. That the plt. has not performed a condition precedent, or that he has not performed it as stated in the declaration, *ante*, 121, &c.; or that the deft. has not been ever requested to perform an act which he ought to have been, *ante*, 130; or has not had a notice he ought to have had, *ante*, 132. 6. That the deft. has performed the contract, as by payment, tender: see those titles. 7. That deft. has been excused performance by reason of the contract being altered, *ante*, "*Alteration*," or rescinded, *post*, "*Releasing Contract*," or released or discharged by award and satisfaction, a negotiable security given, award, judgment recovered, former recovery, foreign attachment, release, &c., see those titles; or higher security given, and *post*, "*Deed*;" or that it has become impossible or illegal to perform the contract, *ante*, 129; or that deft. is discharged by his bankruptcy and certificate, *post*, "*Bankruptcy*;" or under the insolvent Act, *post*, "*Insolvent*;" or by the Statute of Limitations, or set-off, see those titles.

*Reduction of Damages.*] The deft. should be prepared, as far as he can, to reduce the plt.'s damages, in the event of his being entitled to any. We have already seen as to what proofs plt. may show for the purpose of supporting his damages, and deft. should therefore be prepared, as much as possible, to disprove them. He should show all he can as to his having complied with the contract, as, by having offered to complete it before action brought, or the like: see *Rawson v. Johnson*, 1 *East*, 211. He may, it seems, reduce the damages, by [\*154] showing a partial failure by plt. of the consideration. Thus, though there be an agreement that a specific sum of money shall be paid for the performance of a work or act, the claim may be reduced by showing that the work or materials or act were not according to the agreement; and it appears, indeed, that the damages may be reduced *in toto*, and the whole demand defeated, by showing that the work is not so adequate, or totally inadequate, to answer the purpose for which it was undertaken to be performed, and that the deft. has derived little or no benefit from the act: *Duncan v. Blundell*, 3 *Stark.* 6. But, in such

cases, and where the plt. does not go on a *quantum meruit*, and especially where the object is only to reduce the damages, the deflt. should give the plt. notice of the intended defence, so that he may not be taken by surprise: *Barten v. Butter*, 7 *East*, 479; *Germaine v. Burton*, 3 *Stark*. 32. Proving the service of such notice: *post*, "Notice." In the case of a sale of goods, where there is a stipulated price, and a warranty as to the quality, the vendee may retain the goods, and set up their inferiority in reduction of damages, although he has not offered to return them or given any notice to vendor; *Cormack v. Gillis*, 7 *East*, 480; *Fielder v. Starkin*, 1 *H. Bla.* 17. Where the claim is on a *quantum meruit*, the deflt. may, without notice, reduce the damages, by showing that the work or act was improperly done, and he may entitle himself to a verdict by showing its total inefficiency, and that he has derived no benefit from it: *Farnsworth v. Garrard*, 1 *Camp*. 38; *Fisher v. Samuda*, *ib.* 191; *Denew v. Daverell*, 3 *Camp*. 451; *Okell v. Smith*, 1 *Stark*. 108, *Chit. Cont.* 169. If, however, a bill of exchange have been accepted for the work done, the bad quality and partial insufficiency do not form a ground for reducing the amount claimed: 1 *Camp*. 40. *n.*; *Tye v. Gwynne*, 2 *ib.* 346; 3 *ib.* 38; *Moggridge v. Jones*, 14 *East*, 486; *Archer v. Bamford*, 3 *Stark*. 175, *Chit. Cont.* 169. And, according to the case of *Hopkins v. Appleby*, 1 *Stark*. 477, if a vendee, &c. of goods deprive the plt. of the means of ascertaining their real value, by using them or otherwise, the deflt. cannot reduce the damages. In an action for use and occupation, where there has been a partial eviction or deprivation by the landlord of the full enjoyment by the deflt. of the property demised, the deflt. should be prepared to prove that fact, for the plt. will only be entitled to damages commensurate with the advantage the deflt. may have actually derived from the occupation of the estate: *Tomlinson v. Day*, 5 *Moo*. 558; *Hall v. Burgess*, 5 *B. & C.* 338; 8 *D. & R.* 67. To prevent a circuity of action and unnecessary litigation in cases of *partial failure* of consideration, defts. have been allowed of late, instead of being compelled to resort to a cross action, to object, in reduction of damages, such partial failure of consideration, and have therefore held the deflt. only to a performance of so much of his contract as would afford the plt. adequate remuneration for that part of the agreement which he has performed, particularly in cases where the party has had notice of such intended defence: *Basten v. Butter*, 7 *East*, 484; *Havelock v. Geddes*, 10 *ib.* 564; *Wilbeam v. Ashton*, 1 *Camp*. 78; *Fisher v. Samuda*, *ib.* 190; *Denew v. Deverell*, 3 *ib.* 451, 2; *Germaine v. Burton*, 3 *Stark*. 32; *Okell v. Smith*, 1 *Stark*. 108, 9; *Lewis v. Cosgrave*, 2 *Taunt.* 2; *Templar v. McLachlan*, 2 *N. R.* 136; *Bragg v. Cole*, 6 *Moo*. 114; *Chit. Con.* 276. In an action by an attorney for his fees, negligence by him is no answer to the action, and is only the subject of a cross-demand, 2 *N. R.* 136; unless, indeed, the negligence has been such as to deprive the plt. of all benefit, and the charges sought to be recovered have been incurred by the plt.'s want of proper caution: *Montriau v. Jefferies*, 2 *C. & P.* 113; *R. & M.* 317, *s. c.*; *Dax v. Ward*, 1 *Stark*. 409; *post*, "Attorney." In an action by a surgeon, &c. for his bill, if the deflt. can prove that he was rather injured than benefited in his health, in consequence of any gross unskill-

fulness or carelessness on the part of the plt. the latter cannot succeed: *Duncan v. Blundel*, 3 *Stark.* 6; *ante*, "Apothecary." And \*an agent cannot recover his commission if the principal derive [\*155] no benefit whatever from the acts of the plt.: *Stewart v. Kahle*, 3 *Stark.* 161; *ante*, "Agent."



## ASSURANCE.

See POLICY OF.



## ATTAINDER.

ABATEMENT, *ante*, 2.



## ATTORNEY, ACTIONS BY AND AGAINST.

## I. ACTIONS BY, FOR HIS BILL.

*Form of Remedy*, 155.

*Form of Pleadings*, *ib.*

*Precedents*, 156.

*Commencement and Conclusions of Declaration*, *ib.*

*Declarations for their Fees*, *ib.*

*Evidence for Plaintiff*, 157 to 158.

*Proof of Retainer*, 157.

*Work done*, 158.

*Delivery of Bill*, 159 to 160.

*Reasonableness of Charges*, 162.

*Evidence for Defendant*, *ib.*

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*Form of Remedy.*

THE usual remedy for the recovery of an attorney's fees is by action of assumpsit or debt: *Bradford v. Woodhouse*, *Cro. J.*, 520; *Schw. N. P.* 160. The action lies for soliciting a cause in another, as well as in the court whereof the plt. is an attorney: *Sands v. Trevilian*, *Cro. Car.* 194. An attorney has also a remedy for his fees, by lien on the deeds, &c. of his client, *Tidd*, 82, on the sum recovered by him: *ib.* 338, &c. See further, "Work and Labour." For costs in bankruptcy, incurred before the choice of assignees, the solicitor's remedy for them is by action, not by petition, see *Buck*, 175, *sed vide* 1 *G. & J.* 23, *contra*; for his costs after the choice of assignees, his remedy is by action or petition, 1 *Rose*, 44; and this though the bill has not been taxed: *Turn v. Hayes*, 1 *Stark.* 278; *Finchett v. Howe*, 2 *Camp.* 278.

*Form of Pleadings.*

Where the month for the delivering of the bill previous to bringing the action expires after the first day of the term, the declaration should not be entitled generally of the term, but specially on some particular day in the term, after the expiration of the month: *Dodsworth* [\*156] *v. Bowen*, \*5 *T. R.* 325; *post*, "*Declaration*." An attorney may, if he pleases, always lay or retain the venue in Middlesex, *Yeardly v. Roe*, 3 *T. R.* 573; but, in the Exchequer, he must be one of the four attorneys of the court to entitle him to this privilege: 1 *Price*, 384. And, where it is laid in the country by mistake, the court will not allow him to change it to Middlesex: *Lewis v. Shelley*, 2 *Marsh.* 426; *Pitcher v. Sheriff of Monmouth*, *ib.* 152. When the action is to recover fees on the usual retainer, the usual *indebitatus count*, shortly describing the business done, as in the following precedent, will suffice, and plt. may recover, even on the common count, for work and labour: *Skin.* 217; *Ambrose v. Rowe*, 2 *Show*, 421. But, where an attorney makes an agreement to conduct an action for a stipulated sum above his costs, subject to certain contingencies, he must declare specially, *Guy v. Gower*, 2 *Marsh.* 273; and so, if the defendant be liable in respect of a collateral undertaking in writing, the declaration must be special: 1 *Saund.* 211, *b.* See further, "*Assumpsit*," "*Debt*." As to the plea, *ante*, 138, *post*, "*Debt*."

*Precedents.*

## COMMENCEMENT AND CONCLUSION OF DECLARATION IN K. B. BY AN ATTORNEY OF K. B.

Ellenborough.

— Term, 8 Geo. 4.

(supra.)

Middlesex to wit (*supra*.) John Hill, gent., one of the attorneys of the court of our sovereign lord the now king, before the king himself, being present here in court, in his own person, according to the liberties and privileges of the said court for such attorneys, and other officers of the court aforesaid, from time immemorial used and approved of in the same court, complains of Robert Rose, being in the custody of the marshal of the Marshalsea of our said lord the king, of a plea of, &c. (*as the plea is*). For that whereas, &c. (*The conclusion is the same as in other cases.*) Pledges, &c.

## THE LIKE IN C. P. BY AN ATTORNEY OF C. P.

In the C. P.

— Term, 8 Geo. 4.

Middlesex to wit. Robert Rose was attached by his majesty's writ of privilege, issuing out of his said majesty's court of the Bench here, to answer unto John Hill, gent., one of the attorneys of the said court, according to the liberties and privileges of the said court for such attorneys, and other officers of the said court, from time immemorial used and approved of therein, of a plea of, &c. (*as the plea is*). And thereupon the said John Hill, in his own person, complains, that, whereas, &c. (*The conclusion is as usual.*) Pledges, &c.

## INDEBITATUS COUNT FOR AN ATTORNEY'S FEES.

(*The commencement of this count in assumpsit is as ante 139; in debt as post, "Debt," for the work, labour, care, diligence, journeys, and attendances, of the said plt., by him the said plt. before that time done, performed, and bestowed, as the attorney and solicitor of and for the said deft., and upon his retainer, in and about the prosecuting, defending, and soliciting of divers causes, suits, and businesses, of and for the said deft., and for certain fees due and of right payable to the said plt., in respect thereof; and also for other, the work and labour, care, diligence, journeys, and attendances, of the said plt., by him, the*

said plt., before that time, done, performed, and bestowed, in and about the drawing, copying, and engrossing, of divers conveyances, deeds, documents, and writings, for the said deft., and in and about other the business of the said deft., and for the said deft., and at his special instance and request; and also for divers journeys and other attendances by the said plt., before then made, performed, and given, in and about other the business of the said deft., and for the said deft., and at his like special instance and request: and being so indebted, &c. (*Conclusion in assumpsit as ante, 139; in debt, post, "Debt."* The above form should be altered, if there were no suit, &c., prosecuted, or no deeds, &c., prepared according to the facts. It is usual in assumpsit to add the following form of a quantum meruit; also the common count for work and labour, the money counts, and account stated.

#### THE LIKE ON A QUANTUM MERUIT.

(\* The commencement of this count in assumpsit is as ante, 139; in debt, as post, "Debt.") had before that time done, performed, bestowed, and given, other his work and labour, care, diligence, journeys, and attendances, as the attorney and solicitor of and for the said deft., and upon his retainer, in and about the prosecuting, defending, and soliciting, of divers other causes, suits, and businesses, of and for the said deft., and had also, at the like special instance and request of the said deft., before that time done, performed, and bestowed, other his work and labour, care, diligence, journeys, and attendances, in and about the drawing, copying, and engrossing, of divers other conveyances, deeds, documents, and writings, for the said deft., and in and about other the business of the said deft., and for the said deft.; and had also, at the like special instance and request of the said deft., before that time made, performed, and given, divers other journeys and attendances in and about other the business of the said deft., and for the said deft., he, the said deft., undertook. (*Conclude in assumpsit, as ante, 139; in debt, as post, "Debt."* Add the counts advised in the above precedents.) [\*157]

#### INDEBITATUS COUNT BY AN AGENT AGAINST AN ATTORNEY.

(The commencement in assumpsit is as ante, 139; in debt, as post, "Debt.") for the work and labour, care and diligence, journeys and attendances, of the said plt., by him, the said plt., before that time done, performed, and bestowed, for the said deft., as the agent of the said deft., and upon his retainer, and at his special instance and request, in and about the prosecuting and defending of divers suits, causes, and businesses, for the said deft., and for fees due and of right payable to the said plt., in respect thereof, and in and about the drawing and engrossing of divers deeds, documents, and writings, for the said deft., and at his like special instance and request; and also for other work and labour, care and diligence, of the said plt., by him before that time done, performed, and bestowed, for the said deft., and at his request, and also for divers journeys and attendances by the said plt., before that time taken, made, and performed, for the said deft., and at his like, &c., and being so indebted, &c. (*Conclusion in assumpsit, as ante, 139; in debt, as post, "Debt."* Add the counts advised as above in first precedent.)

See other *Precedents of Declarations*, as clerk in court of the Exchequer, 2 *Chit. Pl.* 70; as one of the sixty clerks in the court of chancery, *ib.*; as a proctor in prosecuting an appeal to the High Court of Delegates, *ib.* 71.

### Evidence for Plaintiff.

The plt. must, in this action, prove his retainer by deft., that he has performed the work and business, the reasonableness of the charges, and in some cases, the delivery of his bill, and lastly, his damages.

*Proof of Plaintiff's Retainer by Defendant.*] The plt. should prove that deft. retained him as an attorney, to do the business in question. This may be done by the producing of deft.'s written instructions, by letter or otherwise, and proving the hand-writing, &c., or by calling plt.'s clerk, or other person who heard deft. give instructions, or admit the retainer. It will be sufficient evidence of a retainer, that, after an award made, deft. directed plt. to do the needful, though plt. was not employed in the first instance: *Dawson v. Lawly*, 4 *Esp. Rep.* 65. Proof of a retainer to commence a suit which is afterwards abated by a



plea of nonjoinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea of abatement: *Crook v. Wright, R. & M.* 278. The retainer may sometimes be inferred from the deft.'s acquiescence in the plt.'s services, or from his voluntarily availing himself of such services. If the father of the deft. employed the plt. to defend a suit for deft., to prove that fact, and the deft. knew of the retainer, and does not disapprove of it is sufficient: *Cameron v. Baker, 1 C. & P.* 268. Proof of a judge's [\*158] \*order, referring the bill to be taxed, and of the deft.'s undertaking to pay what shall appear to be due, and the master's *allocatur*, is sufficient evidence of a retainer: *Lee v. Jones, 2 Camp.* 496. So, proof of deft.'s attending the taxation of plt.'s bill, and not objecting to the items, is sufficient: *Warren v. Cunningham, Gow,* 71. Where one attorney does business for another, the attorney who does the business, universally gives credit to the person who employs him, and not to the client for whose benefit it is done: if, therefore, the attorney in such case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done on the credit of the client, and it furnishes no defence that the business was known by the plt. to be done for the benefit of the client: *Scrace v. Wittington, 2 B. & C.* 11, 3 *D. & R.* 195. In an action against two defts., it seems that, if the business was not not done for the joint benefit, the mere proof of a joint parol employment, and a joint promise to pay, will not suffice, as the case would fall within the Statute of Frauds, requiring such retainer to be in writing; *Hellings v. Gregory, 1 C. & P.* 627. Plt. should, therefore, in such action be prepared to prove there was a joint benefit: and see further, as to proof in actions on guarantees, *post*, "Guarantee." But, if A. & B., being arrested on a bill of which one is drawer, and the other acceptor, go to an attorney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay; consequently to sustain a joint action against them: 1 *C. & P.* 627.

No proof of plt.'s actually being an attorney, or of his having taken out the annual certificate, is required: *Berryman v. Wise, 4 T. R.* 367. Proof of his being retained as such suffices: *Pearce v. Whale, 5 B. & C.* 38; 7 *D. & R.* 512. The disproof lies on deft.: *ib. post*. See further, as to proof of the deft.'s retainer, *post*, "Work and Labour;" *ante*, "Assumpsit," "Admission."

For costs, &c. in bankruptcy, before the choice of assignees, the petitioning creditor is liable, *Hartop v. Jukes, 2 M. & S.* 438, *ex parte Hartop, 1 Rose,* 449, *Hart v. Biggs, Holt, C.* 245, *Hart v. White, ib.* 376, *Bowles v. Perring, 5 Moo.* 290, 2 *B. & B.* 457; the assignees are not, *ib.* 4 *D. & R.* 621, 1 *G. & J.* 35; and, where the petitioning creditor was afterwards made assignee, and the action was brought against him and the other assignee jointly, it was holden the plt. could not recover: *Finchett v. Howe, 2 Camp.* 278; *Tarn v. Heys, 1 Stark.* 278. So, where the solicitor who sued out the commission was retained by the assignees, and, having made out and delivered his bill to them, as well for the business done before the choice of assignees as for that done after, was paid by them a sum of money on account generally, it was holden

that he was bound (as the assignees themselves would have been) to appropriate the sum so received to the payment of that portion of the bill for which the petitioning creditor was liable; and that, therefore, in an action by the petitioning creditor against him for the amount of a private debt, he could not, under those circumstances, set off the amount of the petitioning creditor's costs of the commission, for they were already satisfied: *Phillips v. Dicus*, 15 *East*, 248. In another case, indeed, it was holden at *Nisi Prius*, that where assignees retain the same solicitor that sued out the commission, they make themselves liable to him for the costs, as well before as after the choice of assignees, as upon an original retainer; *Tarn v. Heys, Holt*, 378; 1 *Stark.* 278, *s. c.*; *Archb. B. L.* 219.

*Proof of the Work and Business being done.*] After proof of the retainer, the performance of the work and business must be proved. This may be done by the plt.'s clerk, or other person who has acted and can speak of the causes and the business in respect of which the charges are \*made, and can prove the main items: *Esp. D.* 10. [\*159] It is not the practice to require proof of every item. It seems, however, the plt. should adduce the best possible proof of the main items; and, therefore, in an action to recover the expenses of procuring the execution of a bail-bond, and other charges connected with it, the court held the plt. could not recover any part of his claim, without producing the bond itself in evidence: *Swinford v. Green*, 3 *Stark.* 135. In some cases the necessity of actual proof of the business being done may be dispensed with, as by proving the deft.'s admission of it: thus, proof of a judge's order referring the bill to be taxed, and the deft.'s undertaking to pay what shall appear to be due, and of the master's *allocatur*, will be sufficient evidence of the business having been done: *Lee v. Jones*, 2 *Camp.* 496; see further, *post*, "*Work and Labour*," *ante*, "*Admissions*."

*Proof of Delivery of Bill, when necessary.*] If the action is brought for the recovery of any fees, charges, or disbursements at law or in equity, the plt. must prove the delivery of a bill thereof to deft., or left for him at his dwelling-house, or last place of abode, before the action was commenced, the bill being written in a common legible hand, and in the English tongue (except the law terms and names of writs), and in words at length (except times and sums), the bill being also inscribed with the proper hand of the plt.: 2 *Geo.* 2, *c.* 23, *s.* 23; 30 *Geo.* 2, *c.* 19, *s.* 75, &c. And, by the same act, upon application of the party chargeable by such bill, or any other person in that behalf authorized, unto the Lord Chancellor, Master of the Rolls, or unto any of the courts aforesaid in which, &c., they may refer it to be taxed.

With respect to what items render a bill necessary to be delivered under this act, they are all such as are incurred in respect of business done in any court. A charge merely for suing out a writ of *dedimus protestatam, ex parte Prickett*, 1 *R. N.* 266, or, "for taking instructions, drawing affidavit, *swearing the same, and money for oath*, *Winter v. Payne*, 6 *T. R.* 646; or for business done in the insolvent court, in procuring the discharge of an insolvent, *Smith v. Wattleworth*, 4 *B.*

& C. 364; or obtaining a bankrupt's certificate, *Collins v. Nicholson*, 2 Taunt. 321, *Ford v. Webb*, 3 B. & B. 241; or for business done at quarter sessions, *ex p. Williams*, 4 T. R. 496, *Clarke v. Donovan*, 5 ib. 694; or in a criminal suit at the court of Great Sessions in Wales, *Lloyd v. Manna*, *Tidd*, 330, but see 2 Meriv. 500; or for business done under an extent, *Tidd*, 330, 3 Price, 280; or for "attending and examining deft.'s proposed bail," and "attending the plt. in several actions commenced against deft., and arranging with him to take cognovits therein," *Watt v. Collins*, R. & M. 284, 2 C. & P. 45, s. c.; or for attending a lock-up house, and obtaining deft.'s release, and filling up the bail-bond, *Fearne v. Wilson*, 6 B. & C. 86; or for drawing a warrant of attorney, and attending deft. respecting it, although deft. never executed it, *Wilson v. Gutteridge*, 3 B. & C. 157, 4 D. & R. 738, s. c., *Weld v. Crawford*, 2 Stark. 538, 4 Camp. 68; *sed vide Burton v. Chatterton*, 3 B. & A. 488: renders a bill necessary to be delivered within the statute; and it makes no difference, though the plt. proceeds only for the costs out of pocket: *Miller v. Towers*, *Pea. Rep.* 102.

On the other hand, the plt. need not prove a delivery of his bill to recover a charge not taxable, or where the court has not power to tax; as where a charge is wholly for conveyancing, *Tidd*, 329, *Hooper v. Till*, *Doug.* 199, n., B. N. P. 145, or for preparing an affidavit of a petitioning creditor's debt and bond, &c., the affidavit not having been sworn, and no commission ever having issued: *Burton v. Chatterton*, 3 B. & A. 488; *Wilson v. Gutteridge*, 3 B. & C. 158: nor where the charge is for searching at Judgment Office to ascertain whether satisfaction of a judgment had been entered on the roll, whether issue [\*160] had been entered, and \*whether it had been docketed, in an action between A. & B. *Fenton v. Correa*, R. & M. 262; 2 C. & P. 45, s. c.; nor where the charge is for parliamentary business, *Tidd*, 329; or for negotiating an annuity, *Weld v. Crawford*, *ib.*, 2 Stark. 538; or for paying debt and costs pursuant to undertaking, *Prothero v. Thomas*, 1 Marsh, 539, 6 Taunt. 196, s. c. Nor need an attorney deliver his bill where he sues another attorney: *Ford v. Maxwell*, 2 H. Bl. 589. 12 Geo. 2, c. 13, s. 6, enacts, that 2 Geo. 2, c. 23, s. 23, "shall not extend to any bill of fees, charges and disbursements due from any attorney or solicitor or clerk in court," but that they may use such remedies between themselves as before. Therefore, an agent need not sign or deliver his bill before he sues thereon: *Doug.* 199, n.; *Bridges v. Francis*, *Pea. Rep.* 1; *Nelson v. Garfuth*, 1 Esp. Rep. 221. And this has relation not to the period of doing the business, but to that of action brought, for, if his client afterwards becomes an attorney, the former need not deliver a bill signed in order to recover his charges, *Ford v. Maxwell*, 2 H. B. 589, 1 Esp. Rep. 420, s. c.; or where plt. transacts business for a client who becomes an attorney subsequently: *ib.* Nor need the executors or administrators of an attorney deliver a bill of costs for business done by their testator or intestate previous to suit: 1 Barnard, 433, *Andr.* 276. The statute is confined merely to the attorney himself, and does not extend to his personal representatives: *Barret v. Moss*, 1 C. & P. 4. As to the necessity of a delivery of a bill in case of a set-off, *post.*

There appears some uncertainty as to whether the plt. may recover for items which do not require a delivery of a bill, where there are also other items which do require it; but the distinction appears to be that he may recover such items, where they have *no reference to the business of an attorney*, and he has *delivered no bill at all* before action, but that he cannot where they have such reference, and he has delivered a bill before action: see *Mowbray v. Fleming*, 11 *East*, 285; *Winter v. Payne*, 6 *T. R.* 645; *Hill v. Humphreys*, 2 *B. & P.* 343; 1 *Camp.* 439, *n.* Therefore, where plt. had delivered no bill at all before the action brought, but afterwards delivered a bill of particulars, he was held entitled to recover for money paid to his client's use, having no reference to his business of an attorney, although other items in the particulars were taxable: *Mowbray v. Fleming*, 11 *East*, 285; *Hemming v. Wilton*, 4 *Carr. & Payne*, 318. And a disbursement by an attorney, in consequence of his undertaking to pay the debt and costs, is not a disbursement in reference to his business of an attorney: *Prothero v. Thomas*, 6 *Taunt.* 196; 1 *Marsh.* 539, *s. c.* On the other hand, where a single item in the bill delivered requires such delivery, the bill must be proved to have been regularly delivered before the plt. can recover any item in it having reference to the business of an attorney: *Wilson v. Gutteridge*, 3 *B. & C.* 157; 4 *D. & R.* 738, *s. c.*; *Winter v. Payne*, 6 *T. R.* 645; *Hill v. Humphreys*, 2 *B. & P.* 343. By a late decision at *nisi prius*, the above distinction does not appear be supported, for it was there considered, that where a bill is delivered according to the statute, containing various taxable items, one item of which is not sufficiently described according to the statute, the plt. may still recover the residue of his bill, *Drew v. Clifford*, *R. & M.* 280, *sed quære*; in a more recent case, this doctrine was denied: *Reynolds v. Taplin*, 6 *Dec.* 1826, *coram Abbott*, *C. J. at Guildhall*.

*Mode of Proving Delivery of Bill.*] The delivery is usually proved by the person who delivered the bill, or by deft.'s admission of the receipt of it: *ante*, "*Admissions*." Where a bill was produced, with an endorsement upon it, in the handwriting of a deceased clerk of the plt., whose duty it was to have delivered the bill, purporting that he had delivered a copy on a particular day, and the endorsement was proved to have existed at that date, it was held that the entry was *prima facie* evidence of the delivery of the bill: *Champneys v. Peck*, 1 *Stark.* 404; *ante*, 57. The delivery may be proved by a copy or duplicate, original, without any notice \*to produce the bill delivered, *An-* [\*161] *derson v. May*, 2 *B. & P.* 237; for the bill delivered is in the nature of a notice of demand and action, *Coling v. Treweeck*, 6 *B. & C.* 399, *Vincent v. Slaymaker*, 12 *East*, 377; and a copy of the bill, though not signed by the plt., the original of which only was signed, has been delivered to the deft., is admissible in evidence, without proof of notice to produce the original, 6 *B. & C.* 399; but, in a case where no copy of the bill was either proved to have been made, or produced in evidence, and the plt. attempted to prove the delivery by reading the items of charge from plt.'s books, from which the bill was stated to

have been copied, such mode of proof was held inadmissible: *Philipson v. Chase*, 2 *Camp*. 110.

*Contents of Bill.*] The bill must be written in common hand, in English. It must state the items severally, and not charge a sum in the lump, as, "an action brought, &c., and costs of, taxed at £57. 13s." *Drew v. Clifford, R. & M.* 280; *Reynolds v. Taplin*, 6 *Dec.* 1826, *cor. Abbott, C. J., Guildhall*. Such abbreviations as are common and intelligible, may be used: "Reynolds v. Caswell, 4 *Taunt.* 194; *Frowd v. Stillard, 4 Carr. & Payne*, 51; see 12 *G. 2, c. 13, s. 5*. A mistake in the date of items, which does not mislead, will not render the delivery ineffectual, "as the object of the act is, that the bill might be capable of being taxed:" *Williams v. Barber, ib.* 806. And it should seem, even though plt. cannot recover a particular item, because it is not sufficiently described according to the statute, yet he may recover for those which are: *Drew v. Clifford, R. & M.* 280; 2 *C. & P.* 69, *s. c.* The bill must be signed by the plt. pursuant to the statute, or he will be nonsuited; *Tomlinson v. Clark, 4 Moo.* 4; *Wild v. Crawford, 2 Stark.* 538.

*Proof of Delivery of Bill to Deft.*] If plt. rests his case on proving a delivery to deft. he should prove a personal delivery to him, or his agent, expressly authorized by him to receive it: *Finchett v. How, 2 Camp.* 277. Where the bill was delivered to deft.'s attorney, and deft. afterwards attended the taxation in person, it was held that he thereby recognized the attorney as his agent: *Warren v. Cunningham, Gow*, 73. And where a party in a cause, having changed his attorney in the progress of it, and a judge's order was afterward's obtained by the second attorney for the delivery to him of a bill signed by the first attorney, a delivery to him was held sufficient, *Vincent v. Slaymaker, 12 East*, 372; and see further proof as to agency, *post*, "*Principal and Agent.*" It must be proved that the bill was left with the deft., or his authorized agent; for, where the plt. delivered the bill at due time to deft., who acknowledged the debt, and said he would pay it, but that he did not know what to do with the bill, upon which the plt. took it back again, it was held he could not recover: *Brooks v. Mason, H. Bla.* 290. But it should seem, if plt. proved deft.'s refusal to receive the bill, or his request to take it back, the enactment of the statute would be satisfied: *ib.* When there are several defts., it will be sufficient for him to prove a delivery to one of the acting parties, jointly liable, as it will be presumed that he had authority from the others to receive the bill, *Crowder v. Shree, 1 Camp.* 437; and therefore it is sufficient for him to deliver his bill to the person who gave the instructions, *Finchett v. How, 2 Camp.* 277; but, if he deliver the bill to a party who never intermeddled in the retainer, it will be insufficient: *ib.* Where an attorney has been jointly retained by several defts., to defend several suits brought against each, but in the subject-matter of which they had a joint interest, a delivery to one will be sufficient in an action against all: *Oxenham v. Lemon, 2 D. & R.* 461.

*Proof of Delivery at Deft.'s last Abode.*] If plt. cannot prove a personal delivery to deft., he must prove the bill was left for deft. at his "*dwelling-house, or last place of abode*." Proof of [\*162] the bill having been left at deft.'s counting-house will not suffice: *Hill v. Humphreys*, 2 B. & P. 342, 3 Esp. Rep. 254, s. c. Proof of 'delivery at deft.'s last *apparent* place of abode will suffice; and it is no answer for deft. to show that he had left that place of abode, unless he prove that he had a later *known* place of abode: *Wadson v. Smith*, 1 Stark. 324.

*Proof of Delivery of Bill one Month before Action.*] Plt. must prove the delivery of his bill one month at least before bringing his action. The statute requires a *lunar* month: *Hurd v. Leach*, 5 Esp. Rep. 168; *Crook v. M'Tavish*, 1 Bing. 167. This is exclusive of the day on which the bill was delivered.

To prove the *commencement of the action*, and that it was not brought too soon, plt. may produce and prove the writ: *post*, "*Process*." The *nisi prius* record, in C. P. or by original, is good *prima-facie* evidence, when made up of a term beginning more than a month after the delivery of the bill, to show that the action was not commenced till the expiration of a month after the time of such delivery, *Webb v. Pritchett*, 1 B. & P. 263; however, this proof may be rebutted by the production of the writ, *Rhodes v. Gibbs*, 5 Esp. Rep. 163; and the declaration is admissible evidence, to show that the action was commenced earlier than it appears to have been by the *nisi prius* record: 2 Camp. 497, n.; *post*. And in K. B., in an action by bill, and in the Exchq., the *nisi prius* record, contains a memorandum of the term in which the declaration was filed; and if the first day of that term be within one month after the delivery of the bill, the *nisi prius* record will not be sufficient proof, unless the memorandum be special, stating the precise day on which the bill was filed: 2 Saund. 1, b. n.

*Proof of Reasonableness of Charges.*] The plt. should prove the reasonableness of his charges, as in other actions for work and labour; *post*, "*Work and Labour*." But, if the charges be for business done in court, and they be *taxable*, this does not seem necessary: the bill, however, cannot be taxed at the trial, *Doug.* 199, *Anderson v. May*, 2 B. & P. 237, 7 Price, 234, *Lee v. Wilson*, 2 Chit. Rep. 65; for, if the business which was really done, and which must be proved at the trial, the delay of the deft. for more than a month in objecting to the *quantum*, is an admission that he thinks it to be reasonable. It is sufficient to give in evidence a judge's order to tax the bill, and the master's allocatur: *Lee v. Jones*, 2 Camp. 496. The deft. may, at any time before trial, though after plea pleaded and issue joined, get the bill taxed, *Tidd*, 393; and, as to when the court will tax the bill after it has been settled and paid, *ib.* The plt.'s delivery of his bill is conclusive evidence against him as to an increase on any of the items charged in it, *Lee v. Jones*, 2 Camp. 496; and it is strong presumptive evidence against additional items; but, if there are any real errors or omissions, they may be explained and rectified: *Leveridge v. Bqtham*, 1 B. & P. 49.

*Evidence for Defendant.*

Under the general issue, deft. may give in evidence any matter tending to disprove plt.'s case. Deft. may defeat a claim for a charge of conducting a suit, by proving that he has never had the benefit of plt.'s superintendence and judgment in it; as that he at all times consulted the plt.'s clerk, who practised in plt.'s name; and that plt. lived at such a distance from the clerk, as to prevent his conferring with and directing the clerk, who was therefore left *without instructions*, and acted according to his own judgment: *Hopkinson v. Smith*, 7 Moo. 237; 1 Bing. 13, s. c.; *Taylor v. Glassbrook*, 3 Stark. 75. It will be a sufficient defence, if deft. \*show that plt. has been guilty of [\*163] such gross negligence, as that deft. thereby lost all possibility of benefit, *Templer v. M'Lachlan*, 2 N. R. 136; or that he has not exercised, "reasonable diligence and skill;" and whereby plt. has, through his inadvertence and want of proper caution, incurred the costs sought to be recovered: *Montrieu v. Jefferys*, R. & M. 317; *Farnsworth v. Garrard*, 1 Camp. 38; *Denew v. Daverell*, 3 ib. 452. But, if there are other causes conducing to the loss of the benefit besides the plt.'s negligence, the negligence will be no defence, *Daz v. Ward*, 1 Stark. 409; and mere negligence or unskilfulness is no defence; for, as the plt. comes merely to prove that the work has been done, he is not in a situation to meet a charge of negligence, *Templer v. M'Lachlan*, 2 N. R. 136, 1 Selw. N. P. 167, *Passmore v. Birnie*, 2 Stark. 59; and, if the object were unjustifiable delay, as not filing a plea in abatement, plt.'s neglect is no defence, *Johnson v. Alston*, 1 Camp. 175. It is said to have been determined in the C. P., that, though the deft. has neglected to supply the plt. with money to conduct a cause, and for which reason the plt. would not proceed in it, and quitted the suit before trial, still the plt. could not bring an action for his bill: 14 Ves. 272. Deft. may prove, as a defence, that plt. agreed to be paid in gross for prosecuting the action in respect of which the charges which plt. seeks to recover were incurred, as such agreement would be champarty, *Com. D. Attorney*, B. 14, *Hob. 117*, *Tidd*, 326; or he may prove that the plt. agreed only to charge the money out of pocket, *Parker & or. v. Harcourt*, 5 Esp. Rep. 249; or that plt. conducted the cause for nothing; and evidence that, when the attorney's agent went before the master, to have the bill taxed, he admitted such was the case, will suffice for this purpose: *Ashford v. Price*, 3 Stark. 185. We have already seen how far deft. may dispute the reasonableness of the plt.'s charges; *ante*, 162.

It will be a sufficient defence that plt. has neglected to take out his certificate under 37 G. 2, c. 90, s. 31; and, where deft. proved that plt. had ceased for more than one year to take out his certificate, but it appeared that plt. had since acted as an attorney, it was held that deft. must prove, not only that plt. had ceased in the intervening period to take out his certificate, but that he had not been re-admitted: *Pearce v. Whale*, 5 B. & C. 38; 7 D. & R. 512. Nor is it a defence to a bill for suing out a commission of bankrupt, that an attorney of K. B. is not a solicitor in Chancery: *Wilkinson v. Diggell*, 1 B. & C. 158. A solici-

tor of the equity side of the Exchequer cannot practise in Chancery, nor recover for business he may have done there, it being in contravention of 2 G. 2, c. 23, s. 10 & 24, *Vincent v. Holt*, 4 Taunt. 452, where the case of *Meddowcroft v. Holbrooke*, 1 H. B. 50, was denied to be law.

## II. ACTIONS AGAINST, FOR NEGLIGENCE.

*Form of Remedy*, 163.

*Form of Pleadings*, 164.

*Precedents*,

*Commencement and Conclusion of Bill against*, 165.

*Evidence for Plaintiff*, 165 to 168.

*Retainer*, 165.

*Inducement*, 166.

*Defendant's Negligence*, *ib.*

*Damages*, 167.

*Evidence for Defendants*, 168.

### *Form of Remedy.*

THE form of remedy against an attorney or solicitor, for negligence, is by action of assumpsit or case, though the former is the more usual remedy: \**Reece v. Rigby*, 4 B. & A. 202; *Swannel v.* [\*164] *Ellis*, 1 Bing. 347; *Russell v. Palmer*, 2 Wils. 328; *Pitt v. Yalden*, 4 Burr. 2060. It was formerly thought, where the deft.'s conduct was grounded in fraud, and where he could avail himself of the *Stat. of Lim.*, that case was the proper and more advisable form of remedy, *Brown v. Howard*, 2 B. & B. 73; 4 Moo. 508, 532, s. c.: *Short v. McCarthy*, 3 B. & A. 626; but the decision in *Howell v. Young*, 5 B. & C. 259, shows that such a defence is equally available in either case. Assumpsit is also often advisable for the sake of inserting the money-counts, which may, in some cases, enable the client to recover back the money he has paid for the business done, when there is a total failure of consideration: 5 *Petrs. R.* 602. In some cases, where the negligence or unskilfulness has been very gross, the court whereof deft. is an attorney will interfere: *Sayer*, 50, 169; *Tidd*, 81.

### *Form of Pleadings.*

The observations as to the declaration in assumpsit, *ante*, 111 to 138, must be here attended to. It is necessary, in the declaration, either to state that deft. was retained for reward, or that deft. was retained at his request, or that he was retained as an attorney, which, of itself, implies a consideration: *Dartnell v. Howard*, 4 B. & C. 345; 6 D. & R. 488; *Bourne v. Diggles*, 2 Chit. Rep. 312; *Elsee v. Gatward*, 5 T. R. 143; *Coggs v. Bernard*, 2 Ld. Raym. 909. It is unnecessary to state of what court the deft. was an attorney, and, if stated, it must be strictly proved, *Green v. Jackson*, Pea. Rep. 237; and this, though the deft. plead as an attorney of the court, 2 Ch. R. 311. It is also unnecessary to state any more of the former proceedings than absolutely necessary,



and a variance will be fatal: *Lee v. Ayston, Pea.* 119; *Brown v. Jacobs*, 2 *Esp. Rep.* 726; *ante*, 113. In one or more counts, it is advisable to state the particular act which it was the deft.'s duty to have performed, 2 *Chit. Pl.* 372, n.; and other counts should be added, stating the duty generally, *Rep. T. Hardw.* 309. Plt. must show that the injury sustained resulted from the negligence of deft. In a declaration stating that plt. had employed deft. to conduct an action of ejectment for the recovery of premises forfeited to the plt., by the tenant's neglect to repair, and it was alleged that it was referred to an arbitrator, who was to decide what repairs should be done, &c., and that the arbitrator was ready to proceed, but that deft. neglected to attend him, and it was objected that it was not shown that the arbitrator would have found repairs to have been necessary, or have awarded it in favour of the plt., if the reference had proceeded, the declaration was held sufficient, as it appeared that the arbitrator was competent to decide what repairs ought to have been done, but was prevented by deft.'s negligence: *Swannell v. Ellis*, 1 *Bing.* 347. The declaration, instead of the usual conclusion, concludes with the words, "and, therefore, he prays relief, &c.;" the omission of these words, however, is not a cause for demurrer: *And. R.* 247. The *plea* of the general issue will not, in most cases, suffice to let in evidence of any defence, denying plt. ever had a cause of action against deft.: see *ante*.

### Precedents.

#### BILL AGAINST ATTORNEY OF K. B.

Ellenborough.

Trin. Term, 8 Geo. 4.

Middlesex to wit, (venue). John Hill complains\* of Robert Rose, gent., one of the attorneys of the court of our lord the king, before the king himself, present here in court, in his own person, of a plea of trespass on the case, upon promises, &c. (or as the plea is). For that whereas, &c. (Instead of concluding with the usual words, and therefore he brings his suit, &c., say, and therefore he prays relief, &c.) Pledges, &c.

#### THE LIKE WHEN THE CAUSE OF ACTION ACCRUES, AND THE BILL IS FILED IN VACATION.

\* Ellenborough.

Trin. Term, 8 Geo. 4.

Middlesex to wit. Be it remembered that, on the third day of August, (day of [\*165] exhibiting bill), in the eighth year of the reign of our lord the now king, John Hill brought into the office of the clerk of the declarations of the court of our said lord the king, before the king himself, according to the course and practice of the same court, his certain bill against Robert Rose, gent., one of the attorneys of the said court, and filed the same bill as of Trinity Term, in the eighth year of the reign of our said lord the king, which said bill follows in these words: that is to say, Middlesex to wit, John Hill complains, (as in preceding form, from\* to the end.)

#### BILL AGAINST AN ATTORNEY OF C. P.

In the C. P.

Trin. Term, 8 Geo. 4.

To the justices of our lord the king of the Bench.

Middlesex to wit. John Hill, by — his attorney, complains of Robert Rose, gent., one of the attorneys of his majesty's court of the Bench here present here in court in his proper person, of a plea of trespass on the case on promises,\* (or as the plea is.) For that whereas, &c. (Conclude as in K. B. ante, 164.

#### DECLARATION THEREON, AFTER APPEARANCE.

In the C. P.

Trin. Term, 8 Geo. 4.

Middlesex to wit. Be it remembered, That on the , next, after , in this same term, John Hill came into his majesty's court of the Bench here, by E. F., his attorney,

and brought into the said court here his certain bill against Robert Rose, gent. (as above to the asterisk), and there are pledges for the prosecution thereof, to wit, J. Doe and R. Roe, which said bill follows in these words, that is to say, to the justices of our lord the king of the Bench, Middlesex to wit, John Hill, by, &c. (To the end of the bill, omitting pledges.)

The declaration must so necessarily agree with the peculiar facts of each particular case, that it would be of little or no practical utility to give the form of one here. See precedents of declaration against an attorney for negligently conducting a cause to trial without evidence, 2 Chit. Pl. 371; for not obtaining judgment as soon as he ought, *ib.* 377; for not giving note to a prisoner, whereby he was discharged, *ib.* 378; for not examining the title to an estate bought by plt., *ib.* 379; for taking a defective security from the grantor of an annuity, *ib.* 381; for not putting in bail, whereby plt. was obliged to pay the debt, *ib.* 374; for not putting in a sufficient plea to an action, *ib.* 375; for not appearing, and for suffering judgment, *ib.* 376.

### *Evidence for Plaintiff.*

*Retainer.]* The plaintiff, in this action, must prove his retainer, the purpose for which deft. was retained, the deft.'s negligence, and plt.'s damages. The plt. must prove that he retained the deft. to act as his attorney in the business. This may be done by evidence of a direct retainer, or from deft.'s conduct in the business, or from his admission. If the declaration alleges deft. to be an attorney of a particular court, such allegation must be strictly proved by direct evidence, either by proof that deft. acted as an attorney of the court, *Berryman v. Wise*, 4 T. R. 366; or proof of an examined copy of the roll of attorneys, *ib. Rex v. Crossley*, 2 Esp. Rep. 526; or by the book of admissions from the Master's Office, *ib.* Where the plt. alleged that deft., then being one, &c., of the Court of Great Sessions of Chester, and gave notice to deft. to produce his admission, and it not being produced, the attorney's bill was offered to prove the averment; *p. Ld. Kenyon*, "had plt. stated him generally to have been employed as an attorney, the evidence would have been sufficient, but this bill does not prove him to be an attorney of that court," *Green v. Jackson*, Pea. 237, *Berryman v. Wise*, 4 T. R. 366; nor would it, in such case, be sufficient proof that the deft. put in his plea as an attorney of that court; [\*166] but it is not necessary to prove that deft. has taken out his certificate: *Jones v. Stevens*, Stark. Ev. App. 130.

*Proof of Inducement and Purpose of Retainer.]* The proof as to this must necessarily depend on the particular averment: *ante*, 144. In an action for negligence, whereby plt. lost his debt, and was non-suited, if it be averred that the deft. in the former action was indebted to the plt., it must be substantially proved, and it would be a fatal variance if it appear that such deft. was a married woman: *Lee v. Ayrton*, Pea. Rep. 119. If proceedings in an action are alleged to have taken place prefatory to the deft.'s retainer, the same must be substantially proved: *post*, "Record," "Process." In some cases a misspelling would be a variance, as, if, "to prove an allegation that the said Southall was arrested," &c., a writ be produced with the name *Suthall*, it would seem to be a fatal variance, as the doctrine of *idem sonans* is only applicable to pleas in abatement: *Brown v. Jacobs*, 2 Esp. Rep. 726. If

there be an addition to the name in the writ, it is not fatal if it is omitted in the declaration; *aliter*, if it is stated in the declaration, but is not in the writ: *ib.* In actions for negligence in business not in a court, as taking defective securities or the like, the prefatory inducements should be proved substantially as stated.

*Proof of Negligence.*] The plt. must prove deft.'s neglect, or breach of duty.\* The principal duties of an attorney or agent, are care, skill, and integrity, and if he be not deficient in any of these essential requisites, he is not liable for any error or mistake arising in the exercise of his profession: *Tidd*, 80. An attorney is not liable, in case of reasonable doubt, for a mere error in judgment, and where he has not been guilty of *lata culpa*, or *crassa negligentia*, for a mistake: *Pitt v. Yalden*, 4 Burr. 2060; *Baikie v. Chandless*, 3 Camp. 17. Thus, before the point has been fully settled, that the grant of an annuity is void, unless the trusts of the annuity-deeds be recited in the memorial, it was held that such an omission did not amount to *prima-facie* evidence of a gross negligence, *ib.*; on the other hand, an attorney is liable for neglecting to have a witness in court, previous to the trial, whereby plt. was nonsuited, as it was held he ought to have ascertained that the witness was in attendance, or, if he knew that he could not attend, to have withdrawn the record; *Reece v. Rigny*, 4 B. & A. 202-4. So, where deft. was employed to ascertain the sufficiency of securities, and he relied upon a partial extract from a will, without examining the original, and thereby a damage accrued to plt., he was held liable, *Wilson v. Tucker*, D. & R. N. P. C. 30, 3 Star. 154, s. c. So, where he took on himself to exercise *his own judgment* upon difficult points of law, as arising on an intricate conveyance, &c., for it was his duty "to state the deeds to counsel, &c., otherwise he must draw conclusions at his peril," *p. Bailey, J., Ireson v. Pearman*, 3 B. & C. 812-3; 5 D. & R. 687; where he neglected to charge a deft. (a prisoner) in execution, whereby the deft. was superseded, or where he neglected to declare in due time, he was held liable, *Russel v. Palmer*, 2 Wils. 325, *Pitt v. Yalden*, 4 Burr. 2061; so he is liable for not entering or docketing a judgment within a reasonable time, whereby the presumption arises that the debt was satisfied: *Flower v. Bolinbroke*, 1 Str. 639. Where deft. is employed as an attorney to invest money on a copyhold security, he is liable, if such security turns out defective and invalid; *sembl. Brown v. Howard*, 4 Moo. 508. An attorney is always liable if he acted contrary to the plt.'s express or implied instructions, as he may defend, but not institute, a suit, without express instructions: 3 Meriv. 12. But an attorney is not liable to an action for not filing a dilatory plea, when instructed so to do, merely for delay, *Johnson v. Alston*, 1 Camp. 176; *Pitree v. Blake*, 2 Salk. 515; nor is he liable if his diligence would have been ineffectual: thus, he is not liable for negligence in conducting a suit against excise-officers for a seizure, if it appear

[\*167] \*that such seizure was lawful, *Aitcheson v. Madock*, Pea. 162; nor for negligence in suing a married woman, *Lee v. Ayrton*, *ib.* 119. But deft. must show the diligence would have been ineffectual: *Bourne v. Diggles*, 2 Chit. Rep. 311. The attorney is not

liable if his client took the responsibility on himself: *Wilson v. Tucker*, 3 Stark. 154; *D. & R. N. P. C.* 30, s. c. The question of negligence is for a jury: *Reece v. Righy*, 4 B. & A. 202.

The proof of the negligence must vary according to the statement of the facts of plt.'s case in the declaration, and which must always be consulted in framing the evidence. The parties to the transaction in which the negligence took place, are good witnesses: *Hunter v. King*, 4 B. & A. 209. Where the question is, whether the deft. has been guilty of gross negligence, contrary to the known and usual practice, those who are conversant in the same kind of practice may be examined as witnesses on either side: *Russell v. Palmer*, 2 Wils. 328. If there have been express instructions to deft., the same should be proved. Where the proceedings in a former action form the ground-work of the action against the attorney, such proceedings should be produced, or the necessary steps taken to give secondary evidence of them: *Parry v. Collis*, 1 Esp. Rep. 389; *post*, "Secondary Evidence." Thus, in support of an action for neglecting to have a witness at a trial where plt. was nonsuited, the plt. must prove, by calling such witnesses or otherwise, that the witness was a necessary and material one, that his attendance might have been procured, and that plt. was nonsuited: *Reece v. Righy*, 4 B. & A. 202. And, in an action for the loss of a debt, through deft.'s negligence, plt. must establish the existence of such debt, and, if he has obtained a judgment to recover it, that will be evidence of the debt, and he should prove the judgment by an examined copy of it from the judgment roll. If the former deft. has been arrested on *mesne process*, and the action is against the deft. for negligence, whereby the former deft. was superseded, besides proving the debt the writ should be produced, or an examined copy, if it has been returned, and the actual time of commitment should be proved by the books of the prison: the grounds of the discharge will be shown by means of the *supersedeas* or order of discharge: 2 Stark. Ev. 134-5. If the action is against the deft. for neglecting to charge the former deft. in execution, whereby he was superseded, besides the evidence of the retainer and the judgment, the plt. should prove he was committed to prison, and which is evidenced by the books from the prison where deft. was in custody. The plt. should also prove the grounds upon which deft. was superseded, and which will be done by producing the *supersedeas*, or order for his discharge: *Russell v. Palmer*, 2 Wils. 327. If the action be for negligence in completing a conveyance, where there is a defect in a memorial of an annuity, in consequence of which it is set aside, the plt., to prove the defect, after having proved the retainer of the deft., his conduct of the business, and the execution of the deeds which should be produced, should prove the rule of court, or deny it to be set aside, and an annexed copy of the affidavits used upon the motion: 2 Stark. Ev. 135. So, if the plt. has been evicted in consequence of a defect in title, arising from deft.'s negligence, he should produce the deeds, and prove the execution of them, and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession, producing the writ, or an examined copy, if it has been returned: *ib.*

*Damages*] As the question of negligence is a question to be collected by the jury from the facts, under the direction of the judge, it will be for them to measure the compensation in proportion to the plt.'s injury sustained from deft.'s breach of duty; *Reece v. Righy*, 4 B. & A. 202; *Russet v. Palmer*, 2 Wils. 328; *Swannel v. Ellis*, 1 Bing. 347. If plt. has been put to any costs or expenses in consequence of deft.'s negligence, the plt. should prove the payment of them, as stated [\*168] in the declaration: "*post*, "*Payment*." In an action for negligence, whereby plt. lost his debt, he should, if possible, be prepared to show the probability that he would have recovered the whole of the debt, if the deft.'s negligence had not prevented it, as by giving evidence of the circumstances and solvency of the party indebted to him.

### *Evidence for Defendant.*

The deft. must bring forward all the evidence he can, to meet the charge in the declaration. It is a good answer to the action, that deft.'s diligence would have been ineffectual, but the burden of such proof lies on the deft: *Bourne v. Diggles*, 2 Chit. Rep. 311; *ante*, 167. An attorney may show that he acted from such an error or mistake as a cautious or prudent man might make, and that he was not deficient in reasonable skill and diligence, *Montrieu v. Jefferys*, R. & M. 320; *ante*, 166; so it is a sufficient defence that a mistake in practice arose from the ambiguous meaning of a rule of court, *Laidler v. Elliott*, 3 B. & C. 738, 5 D. & R. 635; or from a doubtful construction of a statute, as whether the trust in an annuity-deed must be particularly set forth in the memorial, before that point had been decided: *Baikie v. Chandless*, 3 Camp. 17. And it would be a sufficient defence for an attorney to show that his neglect was occasioned merely by not following instructions for unjustifiable delay, or some illegal object, as for not filing a plea in abatement for that purpose, *ante*, 166, 7, *Johnson v. Alston*, 1 Camp. 176, 4 Moo. 508; or for not giving previous notice of the commencement of a suit against excise-officers, it being proved that the seizure was legal: *Aitcheson v. Madock*, Pea. Rep. 162. As to other defences, see the various titles throughout this work.



## ATTORNMENT.

See *post*, "LANDLORD AND TENANT."



## AUCTIONEER, ACTIONS BY AND AGAINST.

### I. ACTIONS BY, AGAINST EMPLOYER.

THE form of the remedy, pleadings, and evidence, are the same as those in actions of this nature by an agent: "*Agent*," *ante*, 59, 60.

*Evidence for Defendant.*

If the action be for commission for the sale of an estate, proof by deft. of plt.'s negligence or unskilfulness, whereby the sale becomes nugatory, will defeat the plt.'s claim to recover any compensation for his services: *Denew v. Daverell*, 3 Camp. 451; *M'Clel. R.* 25; see further, "*Agent*," ante, 60-1.

## II. ACTIONS BY, AGAINST THIRD PERSONS.

The form of the remedy, pleadings and evidence, are mostly the same as those in actions of this nature by an agent: "*Agent*," ante, 61-2. An auctioneer, however, having possession, coupled with an interest in the goods which he is employed to sell, arising from his lien and responsibility, &c., is thereby invested with a special property in them, and may maintain assumpsit for the proceeds of the sale, even though he sold them at the house of the owner of the property, and advertised them as his: *Williams v. Millington*, 1 H. B. 81; *Farebrother v. Simmons*, 5 B. & A. 393; *Coppin v. Walker*, 7 Taunt. 237; 2 Marsh. 497, s. c. 501; "*Agent*," ante, 61.

## \*III. ACTIONS AGAINST, BY EMPLOYER. [\*169]

The form of remedy, pleadings, and evidence, are the same as those in actions of this nature against an agent: "*Agent*," ante, 62 to 71.

## IV. ACTIONS AGAINST, BY THIRD PERSONS.

The form of remedy, pleadings, and evidence, are, for the most part, the same as those in actions of this nature against agents: "*Agent*," ante, 72.

*In Action to recover Deposit received by him, and Interest thereon.]* The form of remedy, and pleadings, and evidence, are nearly similar to those in actions by and against vendor and purchaser: post, "*Vendor and Purchaser*."

*Declaration.]* If the action be merely for the deposit, the common count for money had and received will suffice: *Burrough v. Skinner*, 5 Burr. 2639; *Flureau v. Thornhill*, 2 W. Bla. R. 1078. But, if plt. declare on the contract of sale for special damage, as for expenses, whether in examining titles, performing journeys, &c., or for interest, he must state them specially in his declaration: *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 260, s. c.; *Walker v. Constable*, 1 B. & P. 307; *Richards v. Barton*, 1 Esp. Rep. 268; see form against an auctioneer, *Lee v. Munn*, 8 Taunt. 54. Where plt. discovers that the vendor had no title, or a doubtful one, to what deft. sold; as, if he furnished an abstract of the estate, which appeared defective on the face of it, or bad in law, plt. may declare generally: *Wild v. Fort*, 4 Taunt. 334; *Maberley Robins*, 5 ib., 625.

*Evidence for Plaintiff.*

*Proof of Defendant's Liability.]* The liability of an auctioneer to third persons stands on the same principle as other agents: "*Agent*,"

*ante*, 72; *Spittle v. Lavender*, 2 B. & B. 452, 5 Moo. 272, s. c. His not disclosing his principal renders him personally liable, *Hanson v. Roberdeau*, *Peake's Rep.* 120; or acting under a void authority, or knowingly misleading the plt. in a purchase, or the like: *ante*, "*Agent*," *Farebrother v. Simmons*, 5 B. & A. 333; *Waring v. Hoggart*, R. & M. 39; *Stevens v. Adamson*, 2 Stark. 422.

In an action against the auctioneer to recover back the deposit, which he is bound to retain till a proper title is made out, plt. should adduce the usual evidence of the sale by auction and purchase, the payment of the deposit to deft., pursuant to the particulars delivered by deft., which is usually done by deft.'s receipt, *post*, "*Vendor and Purchaser*," "*Receipt*," and the defect of title. The particulars of the sale should be produced and proved, and that they were delivered by the deft. at the time and place of sale, and they will be sufficient evidence of the terms of the sale; and, if they have not been complied with by the deft., plt. has an immediate right to recover the deposit, as money had and received, *post*, "*Money Had and Received*:" but, if the thing sold were to be delivered by a given time, or a good title shown to an estate within a given period, plt. should prove that he applied for the thing sold, and that the time for delivering it had elapsed; or for an abstract of the title to the estate at the specified time, and that he could not obtain them: *post*, "*Vendor and Purchaser*."

If the deft. is not bound to retain the deposit till such title is made out, he may, in answer, show a payment over to the principal; unless, indeed, it appear in evidence that the deft. knew of the defect of title in the premises, or that his principal had no right to the money: *Edwards v. Hodding*, 5 Taunt. 815; *Horafall v. Handley*, 8 ib., 136.

[\*170] And, as to what is \*not a sufficient payment over, see "*Agent*," "*Money Had and Received*." Where an auctioneer does not disclose the name of his principal at the time of the sale, he renders himself personally liable to the purchaser, though he has paid over the money to the principal: *Hanson v. Roberdeau*, *Peake's Rep.* 120. "It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it, for the buyers act on the faith of those descriptions:" 5 B. & A. 259; *per Abbott, C. J.* So an auctioneer putting up premises for sale, is bound to know how they are circumstanced; and, therefore, where premises were in a dilapidated state, and the landlord had given notice to lessee that he would re-enter (under such a covenant in lease) if they were not put into repair, and the auctioneer sold the premises without communicating the notice to the purchaser, he was permitted to recover the deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of the sale, and it did not appear that the auctioneer knew of the notice of re-entry having been given: *Stevens v. Adamson*, 2 Stark. 422. And, where a lessee of lands, subject to a covenant against certain obnoxious trades, with a proviso for re-entry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso; held, that the purchaser thereof might recover back his deposit from the auctioneer, owing to such omission; as it was his duty truly and honestly

to represent that which he was to sell: *Waring v. Hoggart*, R. & M. 39.

In an action to recover interest, plt. should be prepared to show, in addition to the usual proof of the sale, payment of the deposit, defect of title, &c., either the deft. is liable as a principal, or else that he personally made use of the deposit, or a demand made on him to return it, after the defective title discovered: *Lee v. Munn*, 8 Taunt. 45; 1 Moo. 881, s. c.; *Farquhar v. Farley*, 7 Taunt. 594; *Edwards v. Holding*, 5 Taunt. 815; 1 Marsh. 377. As to expenses, post, "*Vendor and Purchaser*."



## AUTRE ACTION PENDENT.

*Ante*, 17.



## AVERAGE, GENERAL. ACTION FOR.

*Form of Remedy*, 171.

*Form of Pleadings*, *ib.*

*Precedents*, *ib.*

*Declaration for General Average*, *ib.*

*Evidence for Plaintiff*, *ib.*

*his Ownership of Goods lost*, 172.

*Loss or Expense incurred*, *ib.*

*Goods lost formed the subject of Average*, *ib.*

*Loss, &c., incurred for general Benefit of all*, *ib.*

*Benefit derived from Loss, &c.* 173.

*Defendant's Goods, &c., bound to contribute*, 174.

*Defendant's Ownership of such Goods*, *ib.*

*Value of Defendant's Property*, *ib.*

*Value of Plaintiff's Property, and Mode of Contribution*, *ib.*

*Evidence for Defendant*, 175.

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\**Form of Remedy*.

[\*171]

GENERAL average may be recovered by action at law in assumpsit, wherein each party must, in general sue separately: *Birkley v. Presgrave*, 1 East, 220; *Dobson v. Wilson*, 3 Camp. 480; *Price v. Noble*, 4 Taunt. 193. But the parties entitled to it may proceed in a court of equity, which course of proceeding is frequently advisable, if the account be very complicated; and in equity all the parties join: *Dobson v. Wilson*, 3 Camp. 480. As to the lien for it, *Abbott on Shipp*. 247; *Simonds v. White*, 2 B. & C. 811; 4 D. & R. 375.



### *Form of Pleadings.*

Special counts are usually inserted in the declaration, stating the particular circumstances of the loss; but this seems unnecessary, and the *indebitatus count* would suffice. The plea is the general issue, as for any other defence, which deft. must plead specially. See "*Assumpsit*," and the various titles of references throughout the work.

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### *Precedents.*

#### INDEBITATUS ASSUMPSIT FOR GENERAL AVERAGE.

(*Indebitatus assumpsit, or in debt, as usual: "Assumpsit," 159. "Debt."*) For certain general average before that time, and then and there, due, and payable from the said deft. upon, for, and in respect of, divers goods and merchandises, of him, the said deft., having been before that time carried and conveyed by the said plt. in and on board of a certain ship or vessel called E—, in and during a certain voyage from F— to G—, for the said deft., and at his like special instance and request; and in respect of certain losses, damages, and expenses, by the said plt. incurred in and about the preservation of the said ship and cargo, and the last-mentioned goods and merchandises, from damage and loss during the said last-mentioned voyage. And being so indebted, &c. (Conclusion as ante, 139, "*Assumpsit*," post, "*Debt*," common counts.

#### QUANTUM MERUIT THEREON.

The quantum meruit in *assumpsit* thereon is as ante, "*Assumpsit*" inserting these words:) Had before that time carried and conveyed divers other goods and merchandises of deft.'s in and on board a certain other ship or vessel, called E—, and during a certain other voyage from F— to G—, and had incurred certain other losses, damages, and expenses, in and about the preservation of the said last-mentioned ship and cargo, goods and merchandises, during the said last mentioned voyage: he, the said deft., undertook, &c. (Conclusion as ante 139; add the common counts and the amount stated.)

See another form, 2 *Chit. Pl.* 61; special declaration for, by owner of ship, where anchor, &c., cut away, *ib.* 216; the like where ship entangled in shore, *ib.*, 219; the like where ship, damaged by storms, was laid on beach, and bilged, *ib.*, 220; statement of average losses on policies, *ib.*

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### *Evidence for Plaintiff.*

The plt. must in this action prove his ownership of the vessel or goods upon which the loss or expenses were incurred; that the property lost formed the subject of general average: that such loss or expense arose from something done, for the *sole* purpose and with the intent (*causa et mente*) of benefiting and preserving *the whole*; that the common concern was benefited by the loss or expense, and that the deft.'s property, in respect of the preservation of which the average is claimed, is of a nature bound to contribute its value, and that deft. was its owner; and, lastly, the damages.

[\*172] \*Proof of the Plaintiff's Ownership of the Ship or Goods upon which the Loss or Expenses were incurred.] Slight evi-

dence of this would, it seems, suffice, the plt.'s title not being disputed. It would be evidenced *prima-facie* by plt.'s being in possession. Proof of deft.'s delivery of the goods to plt. as the owner of the vessel would suffice. If the deft. should dispute plt.'s title, and he is not estopped so doing, plt. should be prepared to prove a strict legal title.

*Proof that the Loss or Expense was incurred.]* The evidence for which must depend on the nature of the loss or expense. The log-book should be produced and proved, and some witnesses present at the loss subpoenaed: see *index*, "*Log-Book*." The master usually draws up an account of the jettison, and verifies the same by the oath of himself, and some of his crew, as soon as possible after the arrival at any port. If this has been done, the same should be produced and proved.

*Proof that the Property lost formed the Subject-Matter of General Average.]* Any thing that is lost, or expense incurred, for the benefit of the whole concern, will form the subject matter of general-average. By the practice of this country and France, however, goods stowed upon the deck of the ship are excluded from the benefit of general average: *Abbott*, 355. When an entire ship is taken to freight by a merchant, and the master, without his consent, wrongfully take on board the goods of other persons, and such goods be afterwards cast overboard, to lighten the vessel, the merchant freighter is not bound to contribute to the loss.

*Proof that the loss or Expense was done and incurred for the purpose and with the intent, causa et mente, of Benefiting the Whole.]* This must be proved in the same way as the last, by the log-book, and witnesses present: *Price v. Noble*, 4 *Taunt.* 123; *Birkley v. Presgrave*, 1 *East*, 220. It would be of little utility to enter into a detail of all the numerous cases on this point; so much depending on the particular facts of each case: see *Abbott*, 342 to 363; *Park on In.*; *Stevens on Average*; 3 *Chit. Com. L.* 433 to 440.

The mere suffering a loss will not suffice; it must be something done. Thus, if goods be cast out of the ship by the violence of the waves, or the like, the owner must bear the loss, *Postw. Dict.*, *tit. Average*; but if goods are thrown overboard to lighten a ship, the loss incurred for the sake of all entitles the owner to contribution: *Abbott*, 344. If they were thrown overboard out of caprice, or the like, the owner must bear the loss: 12 *Co.* 63. There is no occasion for any consultation previous to the jettison, &c.: *Abbott*, 345. If, in the act of jettison, or in order to accomplish it, other goods in the ship are broken, or damaged, or destroyed, the value of those also must be included in the general contribution. If it be necessary to take a part of the cargo out in boats for the general benefit, and such goods be lost, the owner is entitled to contribution; but the owner of such goods would not be liable to contribute, if the goods, &c. remaining in the ship be lost during the separation: see *Abbott*, 346; *Sheppard v. Wright*, 1 *Show, P. C.* 18. Goods delivered by way of ransom, in some cases, the owner is entitled to contribution: *Abbott*, 346-7. The loss must be occasioned in the sole object of preserving both

ship and cargo; and this object must be in view at the time of the loss. Where a mainmast was broken in a heavy gale, by carrying an unusual press of sail, in order to escape from an enemy to whom the ship had struck, it was held not a subject of general average: *Covington v. Roberts*, 2 N. R. 378; and see *Taylor v. Curtis*, 2 Marsh. 309; 6 Taunt. 608; *Holt*, C. 193, s. c. Where a ship, being unable to escape from a privateer, resisted the attack, beat off the privateer, reached her [\*173] port, and safely delivered \*her cargo, it was held that neither the expense of repairing the ship, nor of curing the wounds of the sailors, nor of ammunition, was the subject of general average: *ib.* An injury done by one ship to another, or to its cargo, without fault in the person belonging to either ship, is to be equally borne by the owners of the two vessels: *Abbott*, 354.

Expenses incurred in relation to, and for the sole purpose of, the common good and preservation of the whole, frequently form the subject of general average. Expenses incurred in recovering a ship from total destruction, pilotage, post-duties, charges, and expenses incurred by taking a ship into port, to avoid an impending peril, and for the safety of the cargo, and the expense of extraordinary assistance to preserve and secure a ship from the violence of a storm, at its entrance into the port of destination, are to be sustained by general contribution: *Berkley v. Presgrave*, 1 East, 220. It seems that, in order to determine whether expenses incurred in consequence of a ship being obliged to go into port, are to be considered as general average, the cause which compelled her, whether it were the violence of the elements, or a collision with another ship, is not material: 3 M. & S. 482. Merely putting back for the sole purpose of shelter and repair, is not sufficient: *Power v. Whitmore*, 4 M. & S. 141. If it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable it to complete and prosecute the voyage, the expense of unloading, warehousing, and re-shipping the goods, should be sustained by general contribution: *Plummer v. Wildman*, 3 M. & S. 482; 1 Rol. Ab. 289; *Da Costa v. Newnham*, 2 T. R. 407. Articles made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and other like expenses, are subjects of general average, *ib.*; but the master's expenses during the unloading, repairing, and re-loading, and crimpage to replace deserters during the repairs, are not, *Plummer v. Wildman*, 3 M. & S. 482; nor are wages and provisions whilst in port in consequence of a tempest, *Power v. Whitmore*, 4 M. & S. 141. But, if a ship should necessarily go into an intermediate port for the sole purpose of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c., during the period of such a detention, may be considered as general average, on the ground that the company should follow the nature of its principal: *Abbott*, 350. For the additional expense of the wages, and maintenance of the crew, incurred while a ship has been waiting for convoy, general contribution has been allowed: *Abbott*, 352-3. The wages and maintenance of the crew during the detention of a ship by the orders of a sovereign power, do not, it seems, form the subject of general ave-

rage: see *Abbott*, 351; *p. Buller, J., Da Costa v. Newnham*, 2 *T. R.* 407.

The repairs and refitting of the ship are not, in ordinary cases, the subject of general average, but they may become so; as, where the ship cannot safely prosecute the voyage with the cargo without such repairs: *ib. Jackson v. Charnock*, 8 *T. R.* 509. If the repairs are merely such as were necessary to enable the ship to prosecute the voyage, and were afterwards of no benefit to the ship, such repairs would be the subject of general average: *Plummer v. Wildman*, 3 *M. & S.* 482. If the ship, by the expenditure in the repairs, gains a lasting benefit, at all events a deduction must be made on that account: *ib.* By a covenant by the owner of a chartered vessel to keep it in repair during the term, it seems he excludes himself from the claim he would otherwise have against the chartered party on a general average, arising out of repairs: *Jackson v. Charnock*, 8 *T. R.* 509.

*Proof that the Common Concern was benefited.*] It need not be proved that the deft.'s property derived an absolute and perfect safety by \*an arrival or delivery at the port of destination, [\*174] or the like. Proof of a temporary safety obtained by the losses suffices: *Abbott*, 354.

*Proof that the Deft.'s Property in respect of which the Average is claimed, is bound to contribute.*] The ship and freight gained in the voyage must contribute, but not the ammunition of the ship, *Abbott*, 306; nor its provisions, even where the cargo consists only of passengers: *Brown v. Anson*, 4 *Bing.* 119; *Park on Insurance*, 217. It has been held, that the freight should contribute in respect of a loss occurring in an outward voyage, in a case where a ship was chartered out and home, and the freight was payable according to the quantity of the homeward cargo, and upon the ship's safe arrival: *Williams v. London Assur. Comp.* 1 *M. & S.* 318; 1 *Edwards*, 210. All merchandise conveyed in the ship for the purposes of traffic, and part of the cargo, to whomsoever they belong, and however small their weight or value, are bound to contribute, *Abbott*, 355-6; but things belonging to, and attached to the persons of the passengers, and taken on board for private use, do not contribute: *Brown v. Anson & or.*, 4 *Bing.* 122. Passengers or crew do not contribute for their safety: *ib.* The owner of slaves must contribute for their safety; but received convicts are not considered as cargo, and cannot be brought into contribution, *Abbott*, 356, *Brown v. Anson & or.*, 4 *Bing.* 122; but the sailors do not contribute from their wages, except for the ransom of the ship: *ib.* 357. The lenders upon bottomry and *respondentia* do not contribute: 1 *Holt on Ship.* 423; 2 *ib.* 201.

*Proof that Deft. was owner of the Property for which he is to contribute.*] General evidence of this will suffice; such as possession, his shipping the goods, &c., or his admissions of the ownership.

*Proof of value of the Def't.'s Property.*] This must be proved, though slight evidence will suffice to throw the disproof on def't. If the average be claimed in respect of the ship, and freight, the contribution must be made according to the value of the ship at the end of the voyage, and the clear amount of the freight, or earnings of the voyage, after deducting the wages of the crew, and other expenses of the voyage: *Abbott*, 356. The value of goods at the time of the plt.'s loss should be proved.

*Proof of Value of Plt.'s Property and Mode of Contribution.*] The value of the plt.'s property at the time of the loss, or the expenses in respect of which the average is claimed, must be proved. The amount of the value of goods must be estimated at the clear price they would have fetched at the place of destination, where the average is adjusted after the ship's arrival at the place of destination. But if the ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted, in this case the goods contribute only according to the invoice price, for the price of sale is unknown. And as to the furniture of the ship, inasmuch as the new articles furnished will, in general, be of greater value than those lost, it is usual to compound the difference, by deducting one-third from the price of the new articles: *Abbott*, 358. And the same very learned writer concludes as to the mode of contribution, with the following example: "Supposing, therefore, a general average to be settled, upon the ship's arrival at the port of destination, according to the above principles, it is necessary, in the first place, to take an account of the several losses which are to be made good by contribution; in the second place, to take another account of the value of all the articles that are to contribute, in which must be included the value of the goods, &c. thrown overboard, &c.; for otherwise the proprietors of those goods, &c., will receive their full value, and contribute [\*175] nothing towards the loss." The value of the "freight of the goods, &c., thrown overboard, should be included: *ib.* 360. The loss is to be calculated between the owner of the ship and owner of the goods, according to the law of the port of discharge: *Simonds & or. v. White*, 2 B. & C. 805; 4 D. & R. 375, s. c. The proportion of the amount of the several shares is usually settled by the broker or ship-agent; but such settlement is not conclusive: 2 *Holt, Shipp.* 200.

### *Evidence for Defendant.*

The evidence for the defence will consist in the disproof of plt.'s case, the whole burden of the case lying on plt.

## AWARD AND ARBITRAMENT, DEFENCE OF.

(FOR ACTIONS ON, SEE POST.)

*How Defendant may avail himself of this Defence, 175.**Form of Pleadings, ib.**Precedents, 176.**Plea of Arbitrament and Award in Assumpsit, ib.**Replication denying Award, ib.**Evidence for Defendant, ib.**the Award, &c. 177.**Effect of Award, ib.**Evidence for Plaintiff, 178.**How Defendant may avail himself of.*

In assumpsit and debt on simple contract, this defence may be given in evidence under the general issue, *non assumpsit* or *nil debet*. It is best, however, to plead it, as it obliges plt. to take issue on some particular part of the plea, and thereby admit the residue: *Ingram v. Milnes*, 8 East, 445; *Allen v. Harris*, 1 *Ld. Raym.* 122; *Bac. Ab. Arbitrament, G*. The same rule will apply to an action on the case. In trespass it should be pleaded specially, *Parsloe v. Bailey*, 2 *Ld. Raym.* 1039; 6 *Mod.* 221; and it will be a good plea in trespass, though the award be not submitted by the plt. and deft. alone; as where, in an action against A., he pleaded award for the same cause between the plt. on one side, and A. and another jointly on the other side, *Thomlinson v. Arriskin, Com. R.* 328; and award made between one of several trespassers and the plt. is a bar to an action against the others: *Peytoe's Case*, 9 *Rep.* 78; *Com. D. Pleader*, 3 *M.* 13.

*Form of Pleadings.*

*Plea.*] This, as in a declaration, usually commences with a statement of the submission, and includes such other statements, as far as the award, as is necessary to sustain the declaration on it: *post*. Where the award is pleaded in bar of a trespass, a place must be laid as to where the submission was made: *Hare v. George, Cro. E.* 66. Most of the precedents state the deft.'s performance of the award; but this is unnecessary where each of the parties have mutual remedies, *Gascoyne v. Edwards*, 1 *F. & J.* 19, *Carth.* 187, *Kydd*, 390, 392, 1 *Ld. Raym.* 122, 1039, 6 *Mod.* 222; or where the award is for a collateral thing, *Parsloe v. Baily*, 1 *Salk.* 76, 6 *Mod.* 222, *s. c.*; or where it is to be performed at a day not yet arrived: 1 *Rol.* 267, *l.* 30; *Lutw.* 56; *Com. D. Accord, D.* 2. But \*where the time of performance is past, and the parties have [\*176] not mutual remedies, deft. must aver a performance: 1 *Rol.* 267, *l.* 25, 27; *Dighton v. Whiting*, 1 *Lutw.* 56. It is not enough to say

the deft. was always ready to perform it: *ib.* Deft. may allege an excuse for the performance, by reason of plt.'s act, as if the deft. tenders the money at the day, and plt. refuses to accept it: 1 *Roll.* 267, l. 40; *Lutw.* 56; *Russel v. Williams*, *ib.* 283.

*Replication.*] The plt. may deny the award, or reply any other matter, which we shall hereafter consider under what the deft. may plead to an action in the award; *post.* The plt. may reply, that the subject-matter of his action was not included in the reference, though the terms of such reference were general, of all matters in difference, and the cause of action were subsisting at the time of the reference: *Ravee v. Farmer*, 4 *T. R.* 146; and *post.*, "*Judgment.*"

### *Precedents.*

#### PLEA OF SUBMISSION TO ARBITRATION, AND AWARD THEREON.

(*Actio non, as usual, see "Assumpsit,"* 141, *pleas in.*) Because he saith, that after the making of the said several promises and undertakings, and before the commencement of this suit, to wit, on, &c., at, &c., divers differences had been had and moved, and were then depending by and between the said plt. and the said deft., for the settling and adjusting of which said several differences, they, the said plt. and deft., by two several writings obligatory, bearing date, to wit, the same day and year last aforesaid, reciprocally bound to each other in the penal sum of £100, to be paid to each other, with conditions to the said bond annexed, to make void the same, if the said plt. and deft., their respective heirs and assigns, did, &c., as by the said several respective bonds and conditions being thereunto respectively had, will more fully and at large appear: and the said deft. in fact says, that the said arbitrators above named, having taken upon themselves the burden of the arbitration aforesaid, betwixt the said plt. and the said deft.; and having deliberately considered what had been alleged and offered by each of the said parties, afterwards and within the said time above limited for the making of their said award, to wit, on, &c., at, &c., made their award in writing of and concerning the premises so referred as aforesaid, under their hands in writing, ready to be delivered to the said parties; by which said award, after making all allowances to the said plt., they, the said arbitrators, found the said plt. to be in arrear to the said deft. in the sum of £60: and, therefore, the said arbitrators, by their said award, awarded and ordered the said plt. to pay to the said deft., or his order, the said sum of £60, in ten days after the date of the said award, which has not yet been paid; and this he is ready to verify. Wherefore he prays judgment, if the said plt. have or maintain his aforesaid action thereof against him the said defendant, &c. (*Add the general issue.*)

#### REPLICATION DENYING THE AWARD.

(*Precludi non, as usual, see "Assumpsit."*) Because he says that the said arbitrators did not make any such award of and concerning the premises, as the said deft. hath, in and by his plea in that behalf, alleged; and this he prays may be inquired of by the country, &c.

### *Evidence for Defendant.*

*Award, &c.*] The deft. should be prepared to prove the submission, and the award, as directed, *post.* 185-6. Some part of this evidence may be dispensed with by the plt. on his replication admitting it. With respect to the proof of the performance, that depends on the fact whether performance is necessary, and which may be collected from the preceding observations relative to the plea, 175.

*\*Effect of.*] An award regularly made under the submission  
[\*177] of the parties, precludes a party to it from afterwards proceeding on the subject-matter concerning which the award is made.

In all actions where accord is a good bar, so is arbitrament, though the converse does not hold: *Com. D. Accord, D.*; *Bac. Ab. Arbitrament, G. ante*, 29. An award of a collateral matter is a good defence: *Parsloe v. Baily*, 1 *Salk.* 76; 6 *Mod. Rep.* 221. It is no defence if the award be void, *Dighton v. Whiting, Lut.* 57, *Russel v. Williams, ib.* 283, *Carth.* 188; or to do a thing, the performance of which the party cannot be compelled to do, 1 *Roll.* 266, l. 35 to 45; or, if the award does not give a new duty, but only discharges the old demand by release, &c.: *Freeman v. Bernard*, 1 *Salk.* 69, 1 *Ld. Raym.* 247, s. c. It is no defence in actions real, nor in actions founded solely on a deed, nor solely upon a statute or record: *Com. D. Accord, D. 2*. An award will not affect any rights of action, unless such rights were included in the matters referred to the arbitrators; and therefore an award made upon a reference of all matters in dispute between the parties, is no bar to a cause of action subsisting against the deft. at the time of the reference; upon proof by plt. that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred: *Com. D. Accord, D. Aleyn*, 5, *Ravee v. Farmer*, 4 *T. R.* 146, *Golightly v. Jellicoe, in notis*, 6 *T. R.* 616; see *post*, evidence for plt., "*Judgment Recovered*." If it is supposed such an answer will be set up, deft. should be prepared to prove the cause of action was referred, and that the arbitrators took it into their consideration, *Smith v. Johnson*, 15 *East*, 214, 215. As to the necessity of proving deft.'s performance, *post*, 186. The effect of an award to pay a sum of money, is to create a debt from one party to the other, and is the subject of an action, or is provable under a commission of bankruptcy: 7 *Price*, 309; *Bac. Ab. Arbitrament, G*. But neither personal nor real property is transferred by the mere force of an award; and, therefore, where it is awarded that one person shall convey certain land to another, though an action will lie for not conveying the land, it was held that the land itself did not pass by the mere force of the award, 1 *Roll. Rep.* 270, *Marks v. Marriot*, 1 *Ld. Raym.* 115; and where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by himself to the landlord, upon the tenant being paid a certain sum, it was held that the property in the hay did not pass to the landlord on his tender of the money, by mere force of the award, against the consent of the tenant, who refused to accept the money, or deliver up the hay: *Hunter v. Rice*, 15 *East*, 100; *Gunton v. Nurse*, 2 *B. & B.* 447; 5 *Moo.* 259, s. c. However, where the arbitrator's powers are created by statute, it will have the effect of a legislative conveyance: as, in the case of commissioners, to set out, allot, and apportion certain land to different persons, the allotments, when duly made, pass an absolute right of property to those persons in whose favour the award is made, *Johnson v. Hodson*, 8 *East*, 39; but it must appear that the commissioners have pursued their authority, or it will not be binding; therefore, where the commissioners, under an inclosure act, were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and they were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been



advertised, it was held that the award was not binding as to the boundaries, as the commissioners had deviated from their authority: *Rex v. Washbrook*, 4 B. & C. 732; 7 D. & R. 221. But a right to any species of property may be ascertained, so as to give the party in whose favour it is made a possessory remedy for the recovery of it, *ib.*: thus, in an action of ejectment, when the lessor of the plt. and the deft. had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the [\*178] deft. from disputing the lessor's title: *Doe v. Rosser*, 3 East, 15. But parties who submit their right to arbitration, can only bind themselves, and the parties claiming under them, as the award cannot be received as evidence of a right, as against strangers: *Rex v. Cotton*, 4 Camp. 444. And it may be as well to observe, that a prospective agreement to refer all matters in dispute which may hereafter arise, cannot be shown as a defence to an action for the recovery of such disputed matter, for the superior courts will not suffer themselves to be ousted of their jurisdiction by the private agreement of the parties, *Thomson v. Charnock*, 8 T. R. 139; and see 2 B. & P. 131.

### *Evidence for Plaintiff.*

The plaintiff must be prepared to support his defence, to defeat the award; see the evidence for deft. in an action on award, *post*, 186. If the subject-matter of the present action was not included in the reference and award, plt. should be prepared to prove it, either by showing it was not a matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration: *Smith v. Johnstone*, 15 East, 214, 215; *Bavee v. Farmer*, 4 T. R. 146; *Golightly v. Jellicoe*, 6 T. R. 610. The arbitrator himself may be called to prove the latter fact: *Martin v. Thornton*, 4 Esp. Rep. 180.



### AWARD, ACTION ON.

*Form of Remedy*, 178 to 180.

*Form of Pleadings*, 180.

*In Assumpsit or Debt on Award, ib.*

*In Debt or Covenant on the Deed of Submission*, 181 to 183.

*Precedents*, 183.

*Assumpsit on a Parol Submission, ib.*

*Debt on Award made under a Rule of Court*, 184.

*Precedents*, 183.

*Plea to Debt on Arbitration-Bond, no award made*, 185.

*Evidence for Plaintiff*, 185.

*the Submission, ib.*

*Arbitrator's or Umpire's Authority, ib.*

*Time for making Award, ib.*

*The Award*, 186.

*Breach, ib.*

*Damages, ib.*

*Evidence for Defendant, ib.*

*Form of Remedy.*

The mode of enforcing an award by the party in whose favour it is made varies according to the form of the submission. Where the submission is made a rule of court, the party may proceed in the summary mode of attachment, *Holt v. Mister*, 1 *Salk.* 83, *Tidd*, 865; and, if a verdict has been taken for the party's security, he may enter up a judgment thereon, and take out execution: *ib.* The party has also a remedy, in some cases, by a bill in equity for a specific performance: he has also a remedy by *action*, which is the remedy to be here considered. The party cannot proceed both by action and attachment at the same time: *Badley v. Loveday*, 1 *B. & P.* 81; *And.* 299; *C. T. Hard.* 106. An action may be maintained against executors as such, on an award, directing them to pay money out of deceased's assets: *Dowse v. Coxe*, 3 *Bing.* 20. It may \*be as well here to observe, that a party [\*179] cannot be sued on a prospective agreement to refer all matters in dispute which may hereafter arise, for not so referring: *semble Tattersall v. Groote*, 2 *B. & P.* 131; *Thompson v. Charnock*, 8 *T. R.* 139.

*Assumpsit.*] When the submission is by parol, or by writing not under seal, the party failing to perform the award may be sued in assumpsit: the submission to refer raising an implied undertaking that each party shall perform his part, 11 *Mod.* 170; and assumpsit lies whether the submission be by order of *nisi prius*, *Bonner v. Charlton*, 5 *East*, 139, or a judge's order, *Still v. Halford*, 4 *Camp.* 19; *Carpenter v. Thornton*, 3 *B. & A.* 57. A revocation of a submission to arbitration not under seal is, in effect, a breach of agreement to stand to, obey, abide, perform, &c., an award, and for which assumpsit lies: *Brown v. Tanner*, *McCl. & Y.* 465; *Warburton v. Storr*, 4 *B. & C.* 103; 6 *D. & R.* 213. On an award to do a collateral act, and not for the payment of money, and when the submission is without deed, assumpsit is the only remedy, 2 *Saund.* 62, *b. n.* 5; and it is the only remedy on an award by submission not under seal, for payment of money by instalments, all of which are not due: *Rudder v. Price*, 1 *H. Bla.* 564; 2 *Saund.* 303, *n.* 6.

*Debt.*] "An action of debt lies on an award for a sum of money awarded upon a submission, either by rule of court, or by deed, or by writing not under seal, or by parol:" 2 *Saund.* 62, *a. n.* (5); *Freem.* 410, 5; *Dilley v. Polhill*, 2 *Str.* 923; *Hawkins v. Colclough*, 1 *Burr.* 276. But to maintain this action on the award, the whole of the money awarded must be due; for, if it be payable by instalments, and any of them are unpaid, it cannot be supported, *Rudder v. Price*, 1 *H. Bla.* 547; and on an award for the performance of a collateral act, debt will not lie, *Puslow v. Baily*, 2 *Ld. Raym.* 1040; nor can it be supported against executors or administrators upon an award made in the lifetime of their testator or intestate when the submission is not under seal, as they might have waged their law: *Hampton v. Boyer*, *Cro. El.* 557; *Freeman v. Bernard*, 1 *Salk.* 69. But, where the parties are bound in a penal sum to perform the award, and it is made within the limited time, an action of debt lies on the bond for the non-performance of the

award, whether the award be to pay money, or to perform a collateral act, or for another breach of the condition, as, for a revocation of the submission; and it has been held, that, where the parties bound under a submission by bonds agreed that the time should be enlarged to a future day, and such agreement was within the period limited to the award, endorsed under seal, (*Browne v. Goodman*, 3 T. R. 592,) on the bonds of submission, the endorsement operates as a defeasance, and that debt on the bond would lie for non-performance of an award made within the enlarged time, but after the original time had expired, *Gregg v. Talbot*, 2 B. & C. 179, 3 D. & R. 446, s. c.; and that, though one of the parties die before the expiration of the period: *Tyler v. Jones*, 3 B. & C. 144; 4 D. & R. 740. By a countermand or revocation of the power of the arbitrator, the bond is forfeited, and debt lies: 8 Co. 82; and see *Milne v. Gratrix*, 7 East, 608; *Oliver v. Collins*, 11 ib., 367; *Marsh v. Bulteel*, 5 B. & A. 507; 1 D. & R. 106, s. c. Where the parties entered into an agreement not under seal to refer a dispute to the arbitration of C. S., and bound themselves mutually in a penalty for the true and faithful observance and performance of the award to be made by C. S., it was held, that the penalty was incurred by a revocation of the submission: *Warburton v. Storr*, 4 B. & C. 103; 6 D. & R. 213, s. c. *Brown v. Tanner*, 1 M. & Y. 464.

*Covenant.*] Where the submission is by deed with covenants to perform the award, covenant lies on such submission for the non-  
[\*180] performance \*of the award; or, where such submission has been revoked, covenant will lie against the party revoking such submission: *Marsh v. Bulteel*, 5 B. & A. 512; 1 D. & R. 106, s. c.; *Charney v. Winstanley*, 5 East, 266. Though the judgment on covenant is only interlocutory, on a judgment by default in an action of covenant for the non-performance of an award, the court will refer it to the master to compute what is due for principal and interest on the award: *Megison v. —*, cited 1 Tidd, 618.

*The Preferable Remedy.*] When the award is merely for the payment of money, and the whole sum is due, debt is the most advisable form of remedy, as the judgment is final: whereas, in assumpsit and covenant it is interlocutory: and debt on the award itself is preferable to debt on the arbitration-bond, as breaches must be assigned or suggested under the 8 and 9 W. 3, c. 11, s. 8: *Welsh v. Ireland*, 6 East, 613; see 2 Saund. 61, 127. If there be any other demand more properly the subject of an action of assumpsit, which may be joined with the demand on the award, it is as well to declare in assumpsit.

### *Form of Pleadings.*

*Declaration—In Assumpsit or Debt on the Award.*] The pleadings in these two actions are so nearly similar, that the observations as to the form may be classed under one head. The venue is transitory. It is usual to commence the declaration with a concise statement of the existing differences; but it does not seem necessary to state the subject-

matter of such differences: 2 *Saund.* 61, *h. n.* 1. The declaration should state the mutual submission upon which the promise or liability is raised, *ib.*, *Dilley v. Polhill*, 2 *Str.* 923, 11 *Mod.* 170; and the terms thereof, either in its very words or legal effect, should be stated accurately. The omission of any thing conditional, and affecting the award, as, "that the same shall be in writing," is fatal: 2 *Saund.* 62, *n.* 3; *Everard v. Patterson*, 2 *Marsh.* 304; 6 *Taunt.* 625, *s. c.*; *Winter v. White*, 1 *B. & B.* 350. It is not in general necessary to state the submission was in writing, nor by bond: *Bell v. Simpson*, 2 *Wils.* 10. In debt, a variance in the statement of the parties to the submission bond would be fatal: 3 *Moo.* 674. In debt, on an award made under a judge's order, with power to enlarge the time for making the award, the enlargement, if any, should be stated according to the facts. The precise day of the enlargement need not, though it is best, to be stated: *Swinford v. Burn, Gow*, *C.* 6. It must be stated the award was made, and that according to the effect of the condition and submission: *Hanson v. Liversedge*, 2 *Vent.* 242; *Bussfield v. Bussfield*, *Cro. J.* 577. No more of the award should be stated than that part, the non-performance of which the plt. complains of, and is relative to the case; but a condition precedent, qualifying the terms of the award should be stated: 2 *Saund.* 62, *b. n.* 5; *Perry v. Nicholson*, 1 *Burr.* 278, 280. Where the submission is according to the ordinary clause, "that the award shall be made in writing, &c., ready to be delivered to the parties, &c., or such of them as shall require the same, on or before a certain day," it is unnecessary to state that it was ready to be delivered, though usual so to do: *Bradsey v. Clyston*, *Cro. C.* 541; 1 *Saund.* 327, *b. n.* Where the submission requires the award to be made in writing, under the hand and seal, &c., it is sufficient to allege it to have been made *under the hand and seal, &c.*, as it must necessarily be intended to be in writing: *Carth.* 159; 2 *Sid.* 38. Where the submission was, "so that the arbitrators made their award *in writing under their hands*," it was held insufficient to aver, "that the arbitrators duly made their award in writing," and judgment was reversed for want of the words "under their hands:" *Everard v. Paterson*, 6 *Taunt.* 625; 2 *Marsh.* 304, *s. c.* And \*where the submission is that the award [\*181] shall be *in writing under the hand and seal, &c.*, it is not sufficient to aver that it was in writing merely, without alleging that it was under the hand and seal, &c., as the submission required: *Henderson v. Williamson*, 1 *Str.* 116, 1 *Bulst.* 110; *Sallows v. Girling*, *Cro. J.* 278, 2 *Saund.* 62 (3). The award must appear to be mutual and certain, *Gray v. Guennap*, 1 *B. & A.* 106, 1 *Saund.* 327, *a. n.* 2; and, if the defect of the award appear on the declaration, it will be bad on demurrer, or after verdict. Plt. need not show the time or place of the award made, 2 *Bro. C. C.* 137, nor make a profert of the award: *Sty.* 459. It is usual to aver that the deft. had notice of the award; but such an averment has been held not to be necessary, because the deft. may take notice of the award, as well as the plt.: 2 *Saund.* 62, *a.* 4. "If, however, it be provided that the award should be notified to the parties, it is no award until notice be given:" *ib.*, 2 *Bulst.* 144. The statement of the non-performance of the award must be according to the

fact: see further, as to the breach, *post*, 182, 3. It is not necessary to aver a demand of payment of the money awarded to be paid, though it is to be paid at a given time or place, *Rowe v. Young*, 2 B. & B. 233; but where, by the award, the plt. on performing some collateral act, as, on giving a covenant, or the like, is to be paid a sum of money, at a certain time or place, it must be stated in the declaration that the plt. was ready at the place to perform his part of the award: *Fitzg.* 53; 1 *Barnard*, 84. Counts should be inserted on the original debt, and on an account stated, under which it is said plt. may recover if he fails on the other counts: *Kingston v. Phelps*, *Pea. Rep.* 227; *King v. Butshore*, 1 *Esp. Rep.* 194; *Railey v. Lechmere*, *ib.*, 377; *Pearson v. Henry*, 5 *T. R.* 6.

*Pleas in Assumpsit.*] The general issue, as in other actions of assumpsit, will in most cases suffice. Under it the validity of the award may be disputed.

*In Debt.*] The plea of *nil debet* will put in issue the whole declaration, as in other actions of debt: *post*, "*Debt*." Therefore, where the award is bad, and the defect appears upon the face of the award, the deft. may take advantage of its defects under this plea: *Sackett v. Owen*, 2 *Chit. Rep.* 40. A tender or set-off, or the like, may be pleaded: see those titles.

*Declaration in Debt or Covenant on the Deed of Submission.*] The principles which govern these two actions are the same as in other actions on bonds and deeds: see "*Debt*," "*Covenant*." In debt on the bond, plt. may either set out the condition and the award, and assign breaches thereof in his declaration, or simply declare on the bond itself, like a common money-bond, reserving the statement of the award and breach for the replication; and this is the best course, unless it be apprehended deft. will let judgment go by default: 1 *Saund.* 58, n. 1; 2 *Saund.* 187, a. 2. In covenant, the preceding observations on the action of assumpsit and debt on the award itself, will for the most part, be applicable. In declaring for revoking the arbitrator's authority, the breach must be stated according to the fact.

*Pleas.*] As in other actions of debt on bond and covenant, the party should plead specially any matter of defence: *post*, "*Debt*," "*Covenant*." The usual pleas are *non est factum*, no award made, or "*nul agard*," performance, &c. The plea of *non est factum* can only be adopted for the purpose of putting the bond of submission in issue: *Sackett v. Owen*, 2 *Chit. Rep.* 40.

The plea of *no award* made should be adopted where no award has, in fact, been made, or even where an award has been made, but [\*182] not according \*to the submission, or which is bad from any defects appearing on the face of it; *Fisher v. Pimbley*, 11 *East*, 188, 2 *Rich. C. P.* 44; *Praed v. D. of Cumberland*, 4 *T. R.* 588.

Matters in excuse of performance or discharge should be pleaded

specially: *Hanson v. Boothman*, 13 *East*, 22. Where the deft. impeaches the award for matter extrinsic, as, for not embracing all the matters submitted, the proper course is to add a plea stating such defects: *Fisher v. Pimbley*, 11 *East*, 188; *Mitchell v. Staveley*, 16 *East*, 58. If the arbitrators have not decided all matters referred to them, or the award is not final or certain, but such defects do not appear on the face of the award, the facts constituting such defects must be specially pleaded, to show it to be inconclusive or uncertain: *Cargey v. Aitcheson*, 2 *B. & C.* 170; 3 *D. & R.* 433; 2 *Bing.* 199, *s. c.* If either of the parties on the last day request the arbitrators to deliver the award, and they refuse and neglect to do so, the bond is void, and the deft. should plead the matter specially: 3 *Mod.* 301; 1 *Saund.* 327, *b. n.* Deft. should also plead a countermand of the submission; and, in such a plea, it need not be alleged deft. gave notice to the arbitrators: *Vynior's case*, 8 *Co.* 162; *Marsh v. Bulteel*, 5 *B. & A.* 507. It seems that the collusion, or other misconduct of the arbitrators, in avoidance of the award, cannot be pleaded, *Wills v. Maccarmick*, 2 *Wills.* 148, 1 *Saund.* 327, *b. n.* 3; nor can it be pleaded where no time is fixed for the arbitrator to make his award, that he made no award within a reasonable time, as the parties might have revoked their authority after requesting the arbitrators to proceed within a reasonable time: *Curtis v. Potts*, 3 *M. & S.* 147. Deft. may plead a tender or set-off to this action: *Ingram v. Bernard*, 1 *Ld. Raym.* 636, *post*, *those titles*. The Statute of Limitations cannot be pleaded as a bar to this action: 2 *Saund.* 64; *et post*, *that title*.

The *plea of performance*, after craving *oyer* of the bond, sets out the award without the recitals, according to the terms of the award, and the non-performance of a condition precedent, if any: see *precedents in Hanson v. Boothman*, 13 *East*, 23; 3 *Chit. Pl.* 977. Where an award comprehends all things submitted, the plea should state a performance of the whole award on deft.'s part, or a tender and refusal, which is tantamount; as, where, in debt on bond conditioned that the deft. and two others should perform an award, the deft. pleads an award that he should pay 20s. to the plt., and each of the others 20s. a piece, and that he paid 20s. to the plt., but says nothing as to the sums to be paid by the other two, which he ought to have done, inasmuch as he is answerable for the whole money, the plea is insufficient, and the plt. has no necessity to assign a breach: 1 *Saund.* 324, *a. n.* 3; *Genn v. Tinker*, 3 *Lev.* 24. The deft. cannot plead performance generally: 6 *Mod.* 3. It suffices for deft. to allege that he performed as much as the award required him to perform: 2 *Buls.* 93.

*Replication.*] If the deft. plead a bad plea, plt. should demur. If the deft. shows the award imperfectly in his plea, plt. should show it properly in his replication: 1 *Saund.* 326. In a replication to debt on bond to perform an award, if deft. pleads no award, the plt. must set forth the whole award, and assign a breach of it: 2 *Saund.* 62; *Fisher v. Pimbley*, 11 *East*, 188. In setting out the award, it must be alleged to have been made according to its form and substance, &c., and in pursuance of the submission: *ante*, 180. It is also usual, in stating the award,

to allege that it is made of and concerning the premises; and, it is said that such allegation supplies all averments that the award is conformable to the submission in the matter referred: 1 *Saund.* 324, n. 2. If the breaches in an action on an arbitration-bond be not assigned in the declaration, plt. must suggest or assign them under the statute 8 and 9 *W.* 3, c. 11, if deft. lets judgment go by default, *Welsh v. Ireland*, [\*183] 6 *East*, 613, or pleads \* *non est factum*, or any other plea not leading to an issue on the breaches: 6 *East*, 613; 2 *Chit. Rep.* 298; *Homfray v. Rigby*, 5 *M. & S.* 60, s. c., ante, 180. The breach may generally be assigned in the terms of the award: *Willcocks v. Nicholls*, 1 *Price*, 109; but all matters necessary to constitute the breach must be distinctly stated: *Serra v. Fyffe*, 1 *Marsh.* 451; 1 *Saund.* 103, d. But it is not necessary to add disjunctive words, as, paid or caused to be paid: *Aleberry v. Walby*, 1 *Str.* 231; 1 *Saund.* 234, c. 6. Where the breach of condition is deft.'s revocation of the arbitrator's authority, it should be so assigned; as, after a revocation, the authority of the arbitrators ceases, and the award subsequently becomes a nullity; consequently, the setting out of the award, and assigning a breach, would be negatived by evidence, *Vynior's case*, 8 *Rep.* 162, *Marsh v. Bulteel*, 5 *B. & A.* 507; and it is unnecessary to allege that the arbitrator had notice of the revocation: *ib.* And, though the breach be informally stated, yet the court will give judgment, if it appear sufficiently on the record: *Charnley v. Winstanley*, 6 *East*, 266. Where a condition precedent is to be performed by plt., he must aver its performance, or an excuse: 3 *Chit. Pl.* 978. The want of assigning a breach is matter of substance; and if omitted, or a bad breach assigned, it will be bad on general demurrer, or even after verdict, 1 *Saund.* 103, n.; 1 *Hob.* 233.

As to the conclusion of a replication, it would seem, that where the deft. pleads performance, he should conclude to the country; "and, where the deft. pleads no award made, and the plt. replies, setting out an award, it seems clear, since the case of *Fisher v. Pimbley*, 11 *East*, 183, that such replication must conclude with an averment, in order that the deft. may have an opportunity of pleading in his rejoinder matter which shows the award to be void in law," 1 *Saund.* 327, n. e., though it was formerly thought otherwise, *ib.*, n. 1.

*Rejoinder, &c.*] What must be consistent with the plea, and not disclose any new matter, as it would be thereby a departure from the plea. "Thus, where to debt on bond the deft. pleaded no award made, the plt. replied, and showed an award, the deft. rejoined that other matters were referred, of which the arbitrators had not taken any notice, &c., and the court adjudged that the rejoinder was a departure from the plea:" 2 *Saund.* 84, c. n. 1; but see note (c), 84, d., where it is stated, "that, after a plea of no award made, the deft. may in his rejoinder show an award void in law," citing *Fisher v. Pimbley*, 11 *East*, 183, *Dudlow v. Watchhorn*, 16 *East*, 41, &c. Where the deft. pleads general performance of the award, a rejoinder of special performance, or an excuse for non-performance, would be a departure: *Co. Lit.* 408. "If the replication set out the whole award, and it be void in law, the deft. should demur: if it set out only a part, omitting that which makes the award

void, the deft. should set out the whole in his rejoinder, and demur :” 1 *Saund.* 327, *b. n. g.*; *Fisher v. Pimbley*, 11 *East*, 188.

### Precedents.

#### DECLARATION IN ASSUMPSIT ON A PAROL SUBMISSION TO AN AWARD.

(*For commencement, post, “Declaration.”*) For that whereas, before the making of the promise and undertaking of the said deft., hereafter next mentioned, certain differences had arisen, and were then depending between the said plt. and the said deft., (touching and concerning, &c., *ante*, 180), to wit, at, &c. (*venue*); and thereupon, for the putting an end to the said differences, the said plt. and the said deft., heretofore, to wit, on, &c. (*any day about the time*), at, &c., aforesaid, each of them respectively and mutually submitted themselves to the award of one E. F., to be made between the said plt. and the said deft., of and concerning of the said differences, and in consideration thereof, and also in consideration that the said plt., at the special instance and request of the said deft. had then and there undertaken, and faithfully promised the said deft., to perform and fulfil the award of the said E. F., to be so made between the said plt. and the said deft., of and concerning the said differences, in all things therein contained, on his, the said plt.’s, part and behalf, to be performed and fulfilled; he, the said deft., undertook and faithfully promised the said plt. to perform \* and fulfil the said award in all things therein contained, on his, the said deft.’s, [\*184] part and behalf, to be performed and fulfilled. And the said plt., in fact, says, that the said E. F., having taken upon himself the burden of the said arbitration, afterwards, to wit, on, &c. (*day of award, or about the time*), at, &c., aforesaid, made his certain award between the said plt. and the said deft., of and concerning the said differences, and did thereby then and there declare and award that the said deft. should pay to the said plt. the sum of £100. for, and in respect, and in full satisfaction and discharge, of the said differences (*according to the award*); of which said award, the said deft. afterwards, to wit, on, &c., aforesaid, had notice, *ante*, 181, and was then and there requested by the said plt. to pay him the said sum of £100, and which said sum of £100 he, the said deft., then and there ought to have paid to the said plt., according to the tenor and effect of the said award, and his promise and undertaking aforesaid; yet the said deft., not regarding his said promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt., in this behalf, did not, nor would at the same time when he was so requested as aforesaid, or at any time afterwards, pay the said sum of £100, or any part thereof, to the said plt., but he to do this hath hitherto wholly refused, and still doth refuse, to wit, at, &c., aforesaid. (*Add counts on original cause of action, money counts, and accounts stated.*)

#### DEBT ON AN AWARD THAT DEFENDANT SHOULD PAY COSTS OF AN ACTION OF EJECTMENT, BROUGHT AGAINST HIM; SUBMISSION MADE A RULE OF COURT, AND COSTS TAXED, &c.

For that, whereas, heretofore, to wit, on, &c., at, &c., a certain action of ejectment being then depending and at issue in the court of our said lord the king at Westr., wherein one John Doe (on the demise of the said A. B.) was the plt., and the said C. D. was deft., it was then and there, by a certain agreement in writing, bearing date, &c., agreed by and between them, the said A. B. and the said C. D., that all matters in difference between them, and the title to the premises in question, and the pleadings in the said cause mentioned, should be referred to the award, arbitration, and determination, of E. F., as an arbitrator indifferently chosen between the said parties, that the said E. F. should make his award in writing, ready to be delivered to the said parties on or before, &c., then next; and that he, the said arbitrator, should have full power to order and direct that judgment in the said cause should be entered for the plt.; that judgment, as in case of nonsuit, should be entered for the deft., as the said E. F. should think proper, and generally to make such other orders therein as to him, the said E. F., should seem meet, as in and by the said agreement, reference being thereunto had, will, amongst other things, more fully and at large appear. And the said A. B. in fact saith, that, after making the said agreement, and within the time limited for making the said award, to wit, on, &c., at, &c., aforesaid, the said E. F., in pursuance of the agreement, having accepted and taken upon himself the said reference, did take and publish his award in writing, of and concerning the premises so referred, as aforesaid, and ready to be delivered to the said parties, and bearing date, &c., last aforesaid; and did thereby then and there award, amongst other things, that he, the said C. D., should, within three months



of the said award, pay to him, the said A. B., or his attorney, his taxed costs as deft. in the said ejectment, as by the said award, reference, &c., being thereunto had, will, amongst other things, more fully and at large appear. And the said A. B. in fact, further saith, that the costs of the said A. B., in the said cause, were afterwards, to wit, on, &c., duly taxed at a large sum of money, to wit, &c.: of all which premises the said deft. afterwards, to wit, on, &c., at, &c., had notice; yet the said deft. hath not paid, or caused to be paid, unto the said A. B., or his attorney, the said sum, &c., for the costs and charges aforesaid, but hath hitherto wholly refused and neglected so to do, and therein wholly failed and made default, whereby, &c. (*Actio accrevit and common counts, post, "Debt."*)

PLEA IN DEBT OR ARBITRATION-BOND, NO AWARD MADE.

[\*185] \*(*Actio non, after crating over of the bond and condition, for the performance of award: see "Debt, Bond."*) Because he says, that the said E. F. and G. H., the arbitrators named in the said condition, did not, on or before the said — day of —, A. D. —, make any award in writing, under their hands and seals, of and concerning the premises in the said condition mentioned, and so referred as aforesaid, ready to be delivered to the said parties in difference, according to the said condition. And this, &c. (*Conclude with a verification in debt, post, "Debt."*)

### Evidence for Plaintiff.

*The Submission.*] In an action on the award, plt. must prove the submission, and that deft. was bound by it. When the submission is by parol, it should be proved by witnesses present on the occasion. Proof of the parties submitting to be examined by an arbitrator or umpire, as to the matter in dispute, would be strong evidence of the submission: *Malson v. Trower, R. & M.* 17. Proof of submission by an agent or attorney will suffice, *Dyer*, 216, *Cayhill v. Fitzgerald*, 1 *Wils.* 28, *Burrell v. Jones*, 3 *B. & A.* 47, *Bac. Ab. Arbt., C.*, *Filmer v. Delber*, 3 *Taunt.* 486; but not by a partner, *Stead v. Salt*, 3 *Bing.* 103; and as to who may submit to arbitration, see 3 *Chit. Com. L.* 640. Where the submission is by writing, not under seal, it should be produced, and proved, as in other cases; *post, "Written Evidence."* If the submission were by deed, the deed must be produced, and proved, as in other cases; *post, "Deeds:"* and where the deed is signed by several parties, submitting several disputes by the same instrument, it would seem that it is necessary to prove the execution of all the parties to the submission, as the consideration for each for entering into the submission was, that the disputes of each party should be settled, not only as to one, but as to all: *Antrum v. Chase*, 15 *East*, 209; 1 *Phil. Evi.* 380. If the award has been made by reference, under a judge's order, or an order of *nisi prius*, which has been made a rule of court, the production of the original rule of court is of itself sufficient evidence, without further proof, *Hill v. Halford*, 4 *Camp.* 17; and, if the action is brought in the same court, an office-copy of the rule will suffice, *ib.*; *post, "Rule of Court."*

*Arbitrator's or Umpire's Authority.*] This must be proved by the submission. If the award be made by an umpire, authorized to be called in by the submission, his appointment should be proved; the recital in an award signed by the two arbitrators, is not sufficient evidence of the appointment: *Still v. Halford*, 4 *Camp.* 19.

*Time of Making the Award.]* The award must be proved to have taken place according to the terms of the submission, within the limited time: 1 *Saund.* 327, b., n. 3. If the time has been enlarged according to the submission, plt. need not prove the precise day of the enlargement, as stated in the declaration: *Swinford v. Burn, Gow, C.* 6. Proof of enlargement by the consent of deft.'s attorney will suffice to bind deft.: 7 *Price*, 644. In a case where there was a proviso in the judge's order for the reference, that the award should be made by a certain time, but ~~that~~, if the arbitrator should not then be prepared, that the time might be enlarged as he might require, and a judge of the court think reasonable and just, it was held that the time for making the award was proved to have been enlarged, by the arbitrator's indorsing on the order, on the day preceding the expiration of the original time, that he required further time, though the judge's order, granting that further time, was not obtained till a subsequent day: *Reid v. Fryalt*, 1 *M. & S.* 2. Proof of an enlargement by mutual consent does not cure the objection of the award being made after \*the time [\*186] limited by the submission, which was by bond: *Brown v. Goodman*, 3 *T. R.* 502, n. If no time be limited for making the award, plt. should show that the arbitrator made it within a reasonable time, or a time acquiesced in by deft.: *Curtis v. Potts*, 3 *M. & S.* 147.

*The Award itself* must be produced, duly stamped: *Preston v. Eastwood*, 7 *T. R.* 96. The execution of it must be proved by the attesting witness, if any, or by proof of his death, and his handwriting; and, in that case, by other evidence of the arbitrator's handwriting. In an action of debt or covenant, if deft., by his pleadings, does not deny the award set out, plt. need not prove it.

*Breach.]* The breach of the award must be proved, as stated, unless deft. by his pleadings, admits it. Plt. need not prove deft. had notice of the award, unless that be a condition to its performance: 2 *Saund.* 62, a. n. If the award enjoin the performance by the plt. of any collateral act, as a condition precedent to his suing for the recovery of a sum of money, payable at a particular time or place, he must prove that he has done such act, and made a demand of the money, or attended at the time and place directed: *Everard v. Paterson*, 2 *Marsh.* 304; 6 *Taunt.* 625, s. c.

*Damages.]* These will be ascertained by the evidence of the breach. If the award be of money due on a balance of accounts to be paid on a particular day and place, if plt. proves a demand at such time and place, he will get interest: *Pinhorn v. Tuckington*, 3 *Camp.* 468; *Marson v. Barber, Gow, C.* 18.

### *Evidence for Defendant.*

Deft. may avail himself of any legal objection to the validity of the award apparent on the face of the pleadings, or that there is a variance between the award declared upon and that produced in evidence, or any

variance in the description of the parties to the deed, *Winter v. White*, 1 B. & B. 350, 3 Moo. 674; and, under the plea of no award made, deft. may take advantage of any material variance between the award produced in evidence and that set forth in the replication; but cannot go into objections to the award in point of law: 1 Saund. 327, b. n. 3; *Foreland v. Marygold*, 1 Salk. 72. "And, if courts of law have not any jurisdiction of the award, so that there is no power to make an application for setting it aside, the deft. may show some irregularity by matter extrinsic, such as want of notice of the meeting, or collusion in the arbitrator; but, if a court of law has such jurisdiction (as where the reference is by rule of court, &c., or by virtue of 9 and 10 Will. 3, c. 15), he cannot, in such cases, impeach the award by proof:" 2 Phil. Evi. 108; 2 Saund. 62, b. n. f.; 1 Saund. 327, c.; *Wills v. Maccarmick*, 2 Wils. 148. In an action for non-performance of the award, deft. may also show plt.'s death before the delivery of the award, whereby the arbitrator's authority is determined, 2 Saund. 133, b., *Dowse v. Coxe*, 3 Bing. 30, 31; or any other fact, showing a revocation of the submission: and, where no time is limited for the arbitrators to make their award, he may prove notice to the arbitrators to proceed within a reasonable time, and their neglect so to do; and that, thereupon, he revoked his submission: *ib.*; *Curtis v. Potts*, 3 M. & S. 145. It might, also, it seems, be a sufficient defence in evidence, that witnesses, before the arbitrator, were not examined upon oath, though the objection was taken at the time, *Ridout v. Pye*, 1 B. & P. 91; but it has been held, that evidence of the parties having been examined separately, and in the absence of each other, was not sufficient: *Matson v. Trower*, R. & M. 17.

If, upon a reference to arbitration, either party is precluded by [\*187] the terms of the rule from going into \*evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference, but he cannot impeach the award: *Doe d. Carlisle v. Morpeth*, 3 Taunt. 378; *Prosser v. Goringe*, *ib.*, 432. If the award was made after the limited time, deft. should be prepared to show it, though the burden of proving the contrary lies on plt.



## BAIL.

See "RECOGNISANCE OF," "INDEMNITY," "SURETY."



## BAIL-BOND.

*Form of Remedy*, 187.

*Form of Pleadings*, 188.

*Declaration*, *ib.*

*Pleas*, 190.

*Replication*, 192.

*Precedents, ib.*

*Declaration on Bail-Bond, where original Action by Bill of Middlesex or Latitat, 192.*

*the like in C. P., 194.*

*Plea, no Process against Principal, ib.*

*Comperuit ad Diem, ib.*

*Evidence for Plaintiff, 195.*

*Non est factum, ib.*

*Nil debet, ib.*

*Comperuit ad Diem, ib.*

*No Process against Principal, ib.*

*No Process as that stated in Declaration, ib.*

*No Affidavit filed, ib.*

*Debt levied on Principal, 196.*

*Ease and Favour, ib.*

*No Assignment, ib.*

*Sum Recoverable, ib.*

*Evidence for Defendant, ib.*

*Non est factum, ib.*

*Comperuit ad Diem, ib.*

*No Process as that stated in Declaration, ib.*

*Debt levied on Principal, 197.*

*Ease and Favour, ib.*

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*Form of Remedy.*

THE form of remedy by action on a bail-bond is debt. The action may be brought in the name of the sheriff or the assignee, if it has been assigned under the 4 *Anne*, c. 16, s. 20. Several actions against the bail and principal, separately, at the same time, are not allowed, unless for some good reasons, as that the parties cannot be served with process, &c.: *Key v. Hill*, 2 *B. & A.* 598; 1 *Chit. Rep.* 337, s. c., *Abbott, C. J., diss.*; 8 *Price*, 174. The action cannot be brought in C. P., pending a rule to bring in the body: *Tidd*, 297. The action by the assignee must be brought in the same court from whence the process issued on which the bail-bond was taken: *Chesterton v. Middlehurst*, 1 *Burr.* 642; *Walton v. \*Beat*, 3 *ib.*, 1923; *Barnes* 92, 117; [\*188] *Morris v. Rees*, 3 *Wils.* 348. If the original action be instituted in an inferior court, the action upon the bail-bond must, notwithstanding be brought there, *Dixon v. Helsop*, 6 *T. R.* 365, *Donatty v. Barclay*, 8 *ib.* 152, 1 *Burr.* 643, though the deft. be an attorney of another court: *Barnes*, 117. This rule applies, in the King's Bench, to actions brought on the bail-bond by the sheriff himself, as well as his assignee, *Donatty v. Barclay*, 8 *T. R.* 152, *sed quære*; but it is otherwise in the C. P., *Newman v. Fawcitt*, 1 *H. Bla.* 631, and *Exchequer*, 8 *Price*, 174. And the sheriff is not bound by the rule, though the action be brought in the wrong court: this is no defence under the plea of *non est factum*: *Wright v. Walmsley*, 2 *Camp.* 396. An application may be made to set aside the proceedings, *ib.*, or deft. may plead

in abatement to the jurisdiction, *ib.*, 8 *Price*, 176; or demur, *ib.* The plt. has no remedy on the original consideration, whilst he retains his right to sue on the bail-bond, after assignment to him: *Tidd*, 301, 1 *Chit. Rep.* 394, n. The courts will set aside the proceedings, in cases of irregularity, or for *laches*, *Tidd*, 301; or stay the proceedings on terms, *ib.* 301, 495, &c.

### *Form of Pleadings.*

*Declaration.*] The general rules as to the declaration in debt here prevail. If the action be at the suit of the sheriff, the declaration is simply on the bond, without setting forth the condition, and such bond is not within the 8 and 9 *Wm.* 3, c. 11, s. 8, requiring a suggestion of breaches: *Moody v. Pheasant*, 2 *B. & P.* 446. If the action be at the suit of the assignee, the condition of the bond and breaches are stated, to show why the plt. may sue as assignee.

If the bond was assigned after the first day of term, the declaration must be entitled specially, or it will be demurrable, *Pugh v. Robinson*, 1 *T. R.* 116; *Dickenson v. Plaisted*, 7 *T. R.* 474, or bad after verdict, *ib.*, *sed quære*; but plt. however, may amend: *ib.*

The venue, being transitory, may be laid in any county, the declaration stating the assignment to have been made in that county: *Gregon v. Heather*, 2 *Str.* 727; 2 *Ld. Raym.* 1455, s. c.; *Impey*, 6.

Although the action is brought by an executor of the assignee, it may be in the debt and detinet, 1 *Sel. N. P.* 570. As to the sheriff's description, *infra*.

The writ in the original action should be stated accurately. The day as laid to the issuing of it may be either the day of the teste, or actual issuing, or any other day about the time, if laid with a *videlicet*. The statement of the court, out of which the writ issued, should be correct: *Impey v. Taylor*, 3 *M. & S.* 166; *Mill v. Pollow*, 1 *Moo.* 19, 7 *Taunt.* 271, s. c. A bill of Middlesex should be described as a precept: *Harris v. Bernard*, 2 *Str.* 1069. The usual allegation of the court, at the issuing of the writ, then and still being at Westr. is unnecessary, and sometimes improper, as where the writ is stated, without a *videlicet*, to have been sued out in vacation: *Hart v. Hingeston*, 5 *Burr.* 2586; *Luckett v. Plummer*, 5 *Moo.* 538; 2 *B. & B.* 659, s. c. The name of the person against whom the writ is stated to have been issued, must be accurately stated: *Scandover v. Warner*, 2 *Camp.* 270; *Amey v. Long*, 1 *ib.* 14; *Brown v. Jacobs*, 2 *Esp. Rep.* 1726. Where it was averred in the declaration, that, by a writ of *latitat*, the sheriff was commanded to take one "F. J., by the name of J. J.," an examined copy of the *latitat* was given in evidence, commanding the sheriff to take "J. J." The bail-bond was signed by the principal "F. J., arrested by the name of J. J.," and the plts. offered to prove that this person was their debtor, whom they intended to hold to bail. Lord Ellenb. said "The writ must speak for itself. I cannot hear, that, instead of A. B., [\*189] mentioned in the writ, it was \*meant that the sheriff should arrest X. Y.," and the plts. were nonsuited: *Scandover v. Warner*, 2 *Camp.* 270; *Wilks v. Lorck*, 2 *Taunt.* 399. Where the decla-

ration stated that the sheriff was commanded to take the said *deft. Thomas Atwood*, to answer the plt. of a plea of trespass, "and also to a bill of the said plt., against the said *deft.*," it was holden to be clearly defective, but the court gave leave to amend, on payment of costs: 1 *D. & R.* 551. Where a latitat against D. and two others, was stated as a latitat against D. and John Doe, it was ruled no variance: 1 *T. R.* 236. A writ directed generally to the sheriff of a county, may be described in pleading, as directed to the individual who was in fact the sheriff of the county, when the writ issued: therefore, where the declaration stated that a person sued out a writ, directed to C. Smith, Esq. and Sir R. Phillips, Knt. sheriffs of the county of Middlesex, it was held sufficient; but, as the two officers in that county constitute but *one sheriff*, it has been held to be demurrable to describe them as *sheriffs*, MS.: *Sheriffs of Midlx. v. Barnes*, 2 *Ld. Raym.* 1135; *Bac. Ab. Shf. K.* 162. The return-day of the writ must be stated accurately: *Everett v. Tunnard*, 2 *Chit. Rep.* 624. A reference to the *clausum fregit* part of a writ is not necessary, *Luckett v. Plummer*, 2 *B. & B.* 659, 1 *Moo.* 538, s. c., that to the *ac-etiam* part being sufficient.

The endorsement for bail should be stated accurately. Where the writ states the endorsement to levy the sum, together with the sheriff's poundage, officers' fees, and other legal charges, and incidental expenses attending the same, and the writ, when produced, is to levy the sum, together with the sheriff's poundage, officers' fees, &c., it is a fatal variance, *Stiles v. Rawlins*, 5 *Esp. Rep.* 133; but see *Cousins v. Brown*, *R. & M.* 292. But, where the declaration stated the writ to have been endorsed for £24, and the writ produced was endorsed "for £24 and upwards, besides, &c." it was held by *Abbott, C. J.*, to be no variance; *Williams, as Sheriff of Middlesex*, cited 2 *Chit. Pl.* 447, (b.) It is usual to state that it was by virtue of an affidavit, but it is better omitted, as such allegation will require to be supported by proof: *Webb v. Herne*, 1 *B. & P.* 280; *Whiskard v. Wilder*, 1 *Burr.* 330; 2 *Moo.* 632, *post*. The bond is not void because there was no affidavit, or the sum sworn to be not endorsed in the writ, 1 *Burr.* 330; but see *Hill v. Heale*, 2 *N. R.* 202; *semb. contra*.

The delivery of the writ to the sheriff, and the arrest, are next stated, but, "it is not necessary to state the *arrest*, and if stated, it is not traversable: for the words of the stat. 4 *An. c.* 16, s. 20," and the sheriff taketh bail from such person, against whom such writ, bill, or process, is taken out, are general enough to include the case where the party has not been arrested: *Watkins v. Parry*, 1 *Str.* 444; *Haley v. Fitzgerald*, *ib.* 643; 2 *Saund.* 59, a.

The day of stating the arrest is immaterial. The bail-bond must next be stated, and this accurately. The date of it should be stated accurately, if plt. profess so to do; "the bond must also be taken by the sheriff before the return-day of the writ, otherwise it is void, *Pullein v. Benson*, 1 *Ld. Raym.* 352, on *non est factum*, *Thompson v. Rock*, 4 *M. & S.* 338; so it is void, if executed before the condition is filled up: *Powell v. Duff*, 3 *Camp.* 181; 2 *Saund.* 60. If it appears by the declaration that the bond is void by the provisions of the stat. 23 *H. 6, c.* 9, the declaration will be bad, either upon a general demurrer, or upon

arrest of judgment, after verdict upon a plea of *non est factum*. *Samuel v. Evans*, 2 T. R. 569; *Thompson v. Rock*, 4 M. & S. 338. It is sufficient to declare on the bond, according to its legal effect, without stating the very words of the condition, *Waugh v. Russell*, 1 Marsh. 217, *Shaw v. Lee*, 3 Stark. 76; and, where the condition was, that the party should appear before the king at Westr., and the writ to appear before the king, wheresoever, &c., it was held to be an immaterial variance: *Jones v. Blain*, 9 East, 55; 3 Moo. 214. But where the writ was to appear before H. M. justices of the bench at Westr. and [\*190] \*the condition before the king at Westr., it was held fatal, being different courts: *Renalds v. Smith*, 6 Taunt. 521; 2 Marsh. 258, s. c.; 2 Saund. 60. Where the writ was to answer the plt. in a plea of debt for three hundred and twenty pounds, or in a plea of trespass, with an *ac-etiam*, and the condition was to answer the plt. in a plea of debt or trespass generally, or without mentioning the plea at all, the variances were holden to be immaterial, *Villiers v. Hasting*, Cro. J. 286, *Kirkebridge v. Wilson*, 2 Lev. 123, 2 Show. 51, *T. Jones*, 137, 138, 6 Mod. 122, 10 Mod. 327, *Tidd*, 223; but see *More v. Finch*, 2 Lev. 177, *semb. contra*; for the statute only requires a bond conditioned for the deft.'s appearance, and the description of the plea is merely surplusage. And, where the sheriff, upon an original writ in a plea of trespass on the case on promises, took a bail-bond conditioned for the deft.'s appearance, to answer the plt. in a plea of trespass the court held it to be valid, *Owen v. Nail*, 6 T. R. 702; and see *Lockett v. Plummer*, 2 B. & B. 659; 5 Moo. 350, s. c. So, where the writ in trespass was to appear before the Lord the King at Westminster, and the condition was to appear before the justices of the King's Bench at Westminster, *Kirbride v. Dyke*, 2 Lev. 180, *T. Jones*, 46, s. c., *Lawson v. Haddock*, 2 Vent. 237, 238, the bond was holden good; and, where the writ by original was returnable before the lord the king wheresoever he shall then be in England, and the condition was without the words wheresoever, &c., the court gave judgment for the plt. in an action upon the bond, saying, they would understand that, by appearing before the king was meant before the king in his court, and not before the king in person: *Shuttleworth v. Pilkington*, 2 Str. 1155-6. So, where the condition of the bond, in an action by original, was to appear before the king at Westminster, it was deemed sufficient, *Jones v. Blain*, 9 East, 55; but see *Marsh v. Blackford*, 1 Chit. Rep. 323.

The breach of the bond by reason of the non-performance, should be stated according to the words in the condition.

In stating the assignment, the date, if professed to be stated without a *videlicet*, should be according to the fact. The assignment may be alleged to have been made in a county different from that in which the bail-bond was given, *Gregson v. Heather*, 2 Str. 727; 2 Ld. Raym. 1455; *Fortesc.* 366; but, query, if the bond must not be assigned in the sheriff's bailiwick: *Impey*, 16; *Dalt.* 22. It suffices to state the assignment was made according to the statute, without stating it was sealed or witnessed, *Daves v. Papworth*, *Willes*, 408-9, 2 Saund. 61, b., *Lease v. Box*, 1 Wils. 121; or, if it be stated to be witnessed, it is not necessary to state the names of the witnesses: *ib.* If the assignment appear

on the declaration to have been attested by one witness only, it will be demurrable: *Willes*, 409, *n.* As the assignment is not by deed, a profer is unnecessary: *Lease v. Box*, 1 *Wils.* 121.

The declaration should state the money is due from the bail, and not from the principal; for, where it concluded, "whereby an action hath accrued to the plt. to demand and have of the principal" (instead of the bail), and stated non-payment by the principal, it was held bad on special demurrer: *Morgan v. Sargent*, 1 *B. & B.* 58.

*Plea.*] The general rules as to pleas in debt here prevail; *post*, "*Debt.*"

Deft. may plead *non est factum*; *nil debet* is a bad plea, and, if pleaded, plt. should demur to it; for if he joins issue on it, he will be bound to prove every material averment in his declaration, and also let the deft. into any defence which he may have to the action: *Rawlins v. Danvers*, 5 *Esp.* 38; see 1 *Schw. N. P.* 583. Deft. may show, under this plea, a material variance between the bond and condition, as set forth in declaration, *Morgan v. Edwards*, 2 *Marsh.* 96, 6 *Taunt.* 394, *s. c.*, *Baker v. Newbiggen*, *R. & M.* 93, *supra*; or that the bond is void by erasure, \*alteration, cancelling, &c., *Whelpdale's case*, 5 *Co.* 119, *Co. Lit.* 356, *n.*, *ante*, 76; or by matter of fact that voids it in law: as, coverture, 12 *Mod.* 609, *Lambert v. Atkins*, 2 *Camp.* 272, *post*, "*Debt.*;" lunacy, *Yates v. Boen*, 2 *Str.* 1104, *Faulder v. Silk*, 3 *Camp.* 126; drunkenness, *B. N. P.* 172, *post*, "*Drunkenness.*;" delivered as an escrow, *Stoytes v. Pearson*, 4 *Esp. Rep.* 255, *post*; that it was dated and taken after the return-day of the writ, *Thompson v. Rock*, 4 *M. & S.* 398, *Samuel v. Evans*, 2 *T. R.* 569; or that the condition was not filled up when it was made, *Powell v. Duff*, 3 *Camp.* 181; see *Com. Dig. Fait. a. 1*; but intrinsic matter, which shows that the deed was voidable, as that it was not made according to the 23 *H. 6. c. 9*, or that there was no process to arrest the deft., *Say.* 116, must in general be pleaded. The circumstance of the action being brought in the wrong court, as we have seen, cannot be taken advantage of under this plea: *ante*, 188. The irregularity should be made as a ground of motion to set aside the proceedings, or deft. should plead in abatement or demurrer, *ante*, 188. If the bond or condition be incompatible with the 23d *H. 6. c. 9*, and the defect appear in the declaration, it need not be pleaded; and the objection will be bad even after verdict: *Samuel v. Evans*, 2 *T. R.* 569.

The mere practice of the court cannot be pleaded, if the practice does not go to the merits of the defence; such a plea neither avoids nor denies the facts in the declaration. The mode of taking advantage of irregularities in practice, is by application to the court, or plea in abatement: 5 *Moo.* 168; *Ball v. Swan*, 1 *B. & A.* 393. The deft. cannot plead that the cause was out of court for want of a declaration before the assignment of the bond was taken: *Sampson v. Brown*, 2 *East*, 442.

Matters of defence in equity, *Scholey v. Mearns*, 7 *East*, 153, *O'Kelly v. Sparks*, 10 *East*, 377, or merely founded on the discretion of the court, cannot be pleaded, 2 *East*, 442, *Hayward v. Ribbans*, 4



*ib.* 311, 7 *ib.* 153, *Wright v. Walmsley*, 2 *Camp.* 396; thus, it cannot be pleaded that the action is brought for the benefit of, or as trustee for, the sheriff's officer: 7 *East*, 147: and see *Offly v. Warde*, 1 *Lev.* 235.

The deft. may plead *comperuit ad diem*, or, in other words, that the deft. in the original action appeared according to the consideration. This plea should be concluded with a verification by the record: 1 *Leon.* 90; see evidence to support this plea, *post*.

The deft. (bail) may plead that there was no process issued against the principal.

Or that there is no affidavit of the cause of action filed of record; *sed quære*: see *ante*.

Or that the debt was levied on principal since the commencement of the action.

It may be pleaded, that the bond was taken for ease and favour, contrary to 23 *H.* 6, c. 9., after the return of the process: *Com. D. Plead-er*, 2 *W.* 25. This plea is necessary, if the bond is dated after the return of the writ: *ante*. In this plea, the statute need not, nor should, be set forth, *Samuel v. Evans*, 2 *T. R.* 569; if set forth and misrecited, a variance will be fatal: *Smith v. Jefferys*, 6 *T. R.* 776; *Boyce v. Whitaker*, *Doug.* 94.

It may be pleaded by bail, that the principal was taken under an attachment for non-payment of costs: *Lewis v. Morland*, 2 *B. & A.* 56; 4 *Price*, 23.

The deft. may, in an action by the assignee of the sheriff, plead generally that the bond was not assigned according to the statute: *Dawes v. Papworth, Willes*, 408; 2 *Saund.* 61, n. See evidence to support issue on it, *post*.

The usual plea, that the assignment is not stamped, is no longer sustainable, since the 5 *G.* 4, c. 41.

*Replication.*] See the general rules as to, *post*, "Debt."

To the plea of *comperuit ad diem*, plt. may reply *nul tiel record*: *Lill. Ent.* 498; 1 *Saund.* 92, 2 *ib.* 60. When the record is of the same court, the replication ought to conclude with giving a day to deft., *Cremer v. Wicket, Carth.* 517, 1 *Ld. Raym.* 550, s. c.; but, when of another court, then it should conclude with the usual prayer and verification: *Sandford v. Rogers*, 2 *Wils.* 113; *Newberry v. Stradwick, Com. R.* 533. The replication in C. P., if it gives a day for producing the record, makes a complete issue, and deft. cannot afterwards demur: see *Tipping v. Johnson*, 2 *B. & P.* 302; *Jackson v. Wickes*, 7 *Taunt.* 30; 2 *Marsh.* 354, s. c.

To the plea of no process against principal, plt. may reply the process as stated in the declaration: see *Jackson v. Wickes*, 2 *Marsh.* 354: *sed vide Samuel v. Evans*, 2 *T. R.* 576.

To the plea of ease and favour, if the action be at the suit of the sheriff, plt. should pray an enrolment of the bond; and, after setting it out, state he was sheriff, and deft.'s arrest, and that the bond was made to the plt. as sheriff, and traverse the ease and favour: *Carth.* 301, 302; 1 *Saund.* 9; 2 *ib.* 60. In an action by the assignee, plt. should reply, stating the bond was duly executed, and denying the ease and favour,

concluding to the country; it is not necessary to make a formal traverse of the ease and favour: see 1 *Saund.* 163, n.; *Com. D. Pleader*, 2 n. 25.

### Precedents.

#### DECLARATION ON BAIL-BOND IN K. B., WHERE ORIGINAL ACTION BY BILL OF MIDDLESEX OR LATITAT.

Ellenborough.

Wednesday next after eight days of Holy Trinity, in Trinity Term, 8 G. 4, (some day after the date of the assignment of the bail-bond, see ante, 108; or entitle declaration generally, if the assignment was before the first day of the term.)

Middlesex, to wit, (venue transitory.) John Nokes, assignee of C. D. and E. F., sheriff of the county of Middlesex, according to the form of the statute in such case made and provided, complains of Joseph Styles, being in the custody of the Marshal of the Marshalsea of our lord the king before the king himself, of a plea, that he render to the said J. Nokes, as assignee as aforesaid, the sum of — (the amount of the penalty in the bond) of lawful money of Great Britain, which he owes to, and unjustly detains from him. For that whereas the said plt., on — (the teste, or day of issuing writ), in the year of our Lord —, sued and prosecuted out of the court of our said lord the king, before the king himself, against the said deft. (or if the declaration be against one of the bail, say "against one A. B." a certain writ of our said lord the king, called a latitat, directed to the sheriff of —, (or if a bill of Middlesex, say "a certain precept called a bill of Middlesex, 2 Str. 1060, whereby the sheriff of Middlesex was commanded to take." &c.) by which said writ, our said lord the king commanded the said sheriff to take the said deft., and one Richard Roe (as in writ, ante, 188), if they should be found in his bailiwick, and them safely keep, so that he might have their bodies before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to answer the said plt. of a plea of trespass, and also to a bill of the said plt. against the said deft. for £—, upon promises according to the custom of his said Majesty's court, before his said Majesty to be exhibited, and that the said sheriff should then have there that writ, (or if the arrest was on a bill of Middlesex, say, "precept.") Which said writ (or "precept") afterwards, and before the delivery thereof to the said sheriff of the said county of Middlesex, to be executed as is hereinafter mentioned, to wit, on, &c. (the date of the endorsement, but it is not material), at, &c. (venue), was marked and endorsed for bail for £—, and upwards, according to the form of the statute in such case made and provided; and which said writ (or "precept") so endorsed afterwards, and before the said return thereof, to wit, on, &c. (the date of the bail-bond, but it is immaterial), to wit, at, &c. (venue), was delivered to the said C. D. and E. F., who then and from thence, until, and at, and after the said return of the said writ (or "precept"), were sheriff of the said county of Middlesex, in due form of law to be executed. By virtue of which said writ (or "precept"), the said C. D. and E. F., so being sheriff as aforesaid, afterwards, and before the said return of the said writ (or "precept"), to wit, on the day and year last aforesaid, and within their bailiwick, as such sheriff, to wit, at, &c., aforesaid (county where arrest made), took and arrested the said deft. (or A. B.), by his body, and then and there had and detained him in their custody, as such sheriff, at the suit of the said plt. for the cause aforesaid. And the said deft. (or A. B.), being so arrested, and in custody of the said C. D. and E. F., so being sheriff as aforesaid, by virtue of the said writ, (or "precept"), at the suit of the said plt., the said C. D. and E. F., afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid (the date of bail-bond), as such sheriff, to wit, at, &c. (venue), aforesaid, took bail for the appearance of the said deft. (or A. B.), at the return of the said writ (or "precept"), according to the form of the statute in such case made and provided; and on that occasion the said deft. (or if the action be against one of the bail, say, "the said deft. as bail and surety for the said A. B.") then and there, to wit, on the day and year last aforesaid, at (venue), aforesaid by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the said deft., and now shown to the court of our said lord the king, before the king himself here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said —, so then being sheriff of the said county of Middlesex, as aforesaid, as such sheriff, in the penal sum of £—, of good and lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, with and under a certain condition there under-written, that if the said deft. (or, if

against the bail, "if the said A. B.") should appear before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to answer the said plt. in a plea of trespass, and also to a bill of the said plt. against the said deft. for £—, upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, that then the said obligation should be void, otherwise should be and remain in full force and virtue; as by the said writing obligatory, and the condition thereof, reference being thereunto had, may more fully and at large appear. And the said plt. in fact saith, that the said deft. (or A. B.) did not appear before our said lord the king at Westminster, on Friday next, after the morrow of the Holy Trinity, in the condition of the said writing obligatory mentioned, according to the exigency of the said writ (or "*precept*"), but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the said plt. further saith, that the said writing obligatory being so forfeited, and the money therein specified remaining unpaid and unsatisfied to the said sheriff, the said C. D. and E. F., so being sheriff of the said county of Middlesex as aforesaid, afterwards, to wit, on, &c. (*date of the assignment*), to wit, at, &c., aforesaid (*venue*), at the request of the said John Nokes, the said now plt., and the plt. in the said suit, by an endorsement on the said writing obligatory, duly made and attested, and sealed with the seal of office of the sheriff of the said county of Middlesex, assigned the said writing obligatory to the said plt., according to the form of the statute in such case made and provided. By means whereof, and by force of the statute, in such case made and provided, an action hath accrued to the said plt., as assignee of the said C. D. and E. F., so being sheriff of the said county of Middlesex, as aforesaid, to demand and have of and from the said deft. the said sum of £—, above demanded. Yet the said deft. (although often requested so to do) hath not as yet paid the said sum of £—, above demanded, or any part thereof to the said C. D. and E. F. before the said assignment, or to the said plt., assignee as aforesaid, or either of them, since the said assignment, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same or any part thereof to the said

[\*194] plt., as assignee as aforesaid; to the \*damage of the said plt., as assignee as aforesaid, of £—: and therefore he brings his suit, &c. Pledges, &c.

THE LIKE IN C. B. AGAINST BAIL ON COMMON CAPIAS AD RESPONDENDUM.

In the Common Pleas.

Trinity Term, 7 Geo. 4.

(Entitled specially if assignment after first day of term.)

Middlesex to wit. Joseph Styles was summoned to answer John Nokes, assignee of C. D. and E. F. sheriff of the county of Middlesex, according to the form of the statute in such case made and provided, of a plea that he render to the said John Nokes, as assignee, as aforesaid, the sum of £— (*penalty of bond*), of good and lawful money of Great Britain, which he owes to, and unjustly detains from him; and, thereupon, the said John Nokes, as assignee as aforesaid by G. H., his attorney, complains (*observe the notes throughout to the preceding precedent, and ante, 190*), that whereas the said John Nokes heretofore, to wit, on, &c. (*ante, 190.*) sued and prosecuted out of the court of our said lord the king, before Sir W. D. Best, knight, and his companions, then his majesty's justices of the Bench at Westminster, in the county of Middlesex, a certain writ of our said lord the king, called a *capias ad respondendum*, against one T. K. directed to the sheriff of Middlesex, by which said writ of our said lord the king commanded the said sheriff that he should take the said T. K. and Richard Roe, if they should be found in his, the said sheriff's bailiwick, and them safely keep, so that the said sheriff might have their bodies before the said justices of our said lord the king at Westminster, on the morrow of the Holy Trinity, to answer the said plt., in a plea, wherefore with force and arms the close of the said plt., at Westminster, in the county of Middlesex, they broke, and other wrongs to him did, to the great damage of the said plt., and against the peace of our said lord the king; and also that the said T. K. might answer to the said plt. according to the custom of his said majesty's court of the bench aforesaid, in a certain plea of trespass on the case, upon promises, to the damage of the said plt. of £100, as it was said; and that the said sheriff should have there that writ, which said writ afterwards, and before the delivery thereof to the said sheriff of Middlesex, to be executed as hereinafter mentioned, to wit, on, &c. (*date of endorsement*), at, &c. (*venue*), was duly marked and endorsed for bail for £50; and which said writ, so endorsed, afterwards, and before the return thereof, to wit, on, &c. (*date of bond*), at, &c. (*venue*), was delivered to the said C. D. and E. F., who then and from thence, and until, and after the said return of the said writ, was sheriff of the said county of Middlesex, in due form of law, to be executed by virtue, &c. (*State arrest, and conclude as in preceding precedent*).

See other forms of declaration on bail-bond in Exchequer, 2 *Chit. Pl.* 452; on bond where original action by original, *ib.* 460; on bond on attachment out of Chancery, *Morris v. Hayward*, 2 *Marsh.* 280; at the suit of assignee of chief bailiff of liberty of Honour of Ponte-

fract, 2 *Chit. Pl.* 453; at the suit of assignee of sheriff of County Palatine of Chester, *ib.* 456; of Lancaster, 5 *Wentw.* 574; and other precedents, *Petersdorff's Index*, "*Bail-Bond.*"

PLEA—NO PROCESS AGAINST PRINCIPAL.

(*Plea of non est factum*, see post, "*Debt.*" Secondly, *Onerari non*, as post, "*Debt.*") Because he says, that no writ or process whatsoever, wherein the said E. F. could and might be arrested and held to bail, returnable in the court of our said lord the king, before the king himself, (or in *C. P.* "in the said court of our said lord the king of the Bench at Westminster,"), was sued and prosecuted by and at the suit of the said A. B. in the said suit in the said condition mentioned. And this, &c. (Conclude with a verification and *onerari non*, as post, "*Debt.*")

COMPERUIT AD DIEM.

(*Actio non*, as post, "*Pleas.*") Because he says, that the said E. F. did appear before the lord the king at Westminster, on ———, in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition, as by the record of the said appearance, "remaining in the said court of our said lord the king before the king himself, at Westminster aforesaid, more fully appears. [195] And this, &c. (Conclude with a verification by the record, as post, "*Pleas.*")

See other forms of pleas, denying issuing of *latitat*; as stated, 3 *Chit. Pl.* 979; no affidavit filed, *ib.*; debt levied against principal, *ib.* 980; ease and favour, *ib.* 981; that bond was given to sheriff on attachment against deft. for non payment of costs, 4 *Price*, 23; and other pleas, 7 *Wentw.* 613-4.)

See replication, denying ease and favour, 3 *Chit. Pl.* 1177.

### *Evidence for Plaintiff.*

*Non est factum.*] Under this plea, plt. will have to prove the execution of the bond in the usual way: 1 *Selw. N. P.* 557; post, "*Deed.*" The delivery, signing, and sealing, as well as deft.'s identity, must be proved: post, "*Deed.*" The bailiff who made the caption is a competent witness to prove the execution, if he witnessed it at deft.'s desire: *Honeywood v. Peacock*, 3 *Camp.* 196. If any defence, besides the mere execution of the bond, be expected under this plea, and which deft. can avail himself of under it, plt. should be prepared to rebut it.

*Nil debet.*] If this plea, as we have seen, be improperly pleaded, but not demurred to, the deft. will be let into any defence applicable to the plea of *nil debet*, in general, post, "*Debt.*," and, in such case, plt. must prove not only the execution of the bond, but all the material averments in the declaration: *Rawlins v. Danvers*, 5 *Esp. Rep.* 38, 9; 2 *Stark. Ev.* 140; ante, 190.

*Comperuit ad Diem.*] The issue on this plea, is to be tried by the record, *Austen v. Fenton*, 1 *Taunt.* 23, and principally lies on deft. If the date of the appearance will decide the issue under this plea, the court will order the day of such appearance to be entered on the filacer's book, according to the truth, *Austen v. Fenton*, 1 *Taunt.* 23, 2 *Hammond*, 901; and, if bail have not justified, the court will, from the same reason, cause their recognisance to be taken off the roll, because it testi-

fied a falsehood, the truth of which the sheriff would otherwise have no opportunity of controverting. The deft. must prove the fact of his appearance by production of the record; as, the roll, showing the recognisance of bail, the filacer's book, the bail-piece, &c., according to the practice of the court in which the action is brought.

*No Process against Principal.]* Plt. must be prepared to prove this by production of a transcript of the writ taken from the record, and prove it by a witness, who has compared it with the original, or who has examined the copy, whilst another read the original: *M'Neil v. Perchard*, 1 *Esp. Rep.* 263; *Rolf v. Dart*, 2 *Taunt.* 52; *Reid v. Margison*, 1 *Camp.* 470.

*That there was no such Process stated in Declaration against Principal.]* The plt.'s evidence in support of this plea will be similar to the last. Under it deft. may take advantage of a variance: see *ante*, 188, *post*, 196.

*No Affidavit.]* If deft. pleads there is no affidavit of the cause of action filed, plt. should produce and prove an office copy in the usual way: see "*Affidavit*;" 2 *Moo.* 62; *Webb v. Hearne*, 1 *B. & P.* 280; *Whiskard v. Wilder*, 1 *Burr.* 330. The original affidavit must be produced, if the declaration state it to have been made by any particular person: *Webb v. Hearne*, 1 *B. & P.* 281; 2 *Moo.* 61.

[\*196] *Debt levied on Principal.]* The burden of proof on this plea lies on deft.: *post*, 197.

*Ease and Favour.]* The burden also of proof in this plea lies on deft.: see *post*, 197. Plt. should be prepared to disprove the plea by showing the time of execution of the bonds.

*Plea denying Assignment.]* In proving this plea, it must be shown that the injunctions of 4 *An. c.* 16, s. 20, were strictly complied with: that it was done in the presence of two competent witnesses, by the sheriff, or other officer, putting his hand and seal to it. It is sufficient, therefore, if the under-sheriff does it in the name of the high-sheriff; and there is no necessity to prove his appointment, as it will be presumed that the under-sheriff has authority so to do, *virtute officii*, *Doe d. James v. Brawn*, 5 *B. & A.* 243; and, in the case of an assignment of a replevin-bond, it was held sufficient, though neither done by the sheriff or under-sheriff, but a person accustomed to act in the sheriff's office: *Middleton v. Sandford*, 4 *Camp.* 36. In *Kelson v. Fagg*, 1 *Str.* 60, it is stated, that the assignment could not be done by the under-sheriff's clerk; but, in a later case, where it appeared in evidence that the bond had been assigned to the plt. by one of the under-sheriff's clerks, *L. Mansfield* was of opinion that the seal to the assignment, being the seal of office, was sufficient to prove its validity, whoever signed it: *Harris v. Ashley*, 1 *Scho. N. P.* 586.

*Sum Recoverable.*] The amount which the plt. is entitled to recover is not limited to the sum sworn to and costs, but the bail are liable to pay the plt. the whole debt, for which the plt. might have had judgment against the original deft., to the full extent of the penalty in the bond: *Orton v. Vincent*, *Cowp.* 71; *Mitchell v. Gibbons*, 1 *H. Bla.* 76; *Peters v. Morgan*, 2 *Ld. Raym.* 1564; 1 *East*, 91, *n.*; *Stevenson v. Cameron*, 8 *T. R.* 29. And, it seems, that where bail are let in upon terms to try the cause, the money levied to abide the event, and the bail-bond to stand as security, the bail are not liable beyond the penalty, though the debt and costs exceed it after the trial, and the plt.'s debt would have been fully covered when the bail were first let in to try upon terms: 2 *Smith*, 364. Each of the bail are liable for his own costs, as well as to costs in the first action: 2 *Saund.* 61, *n.*

### *Evidence for Defendant.*

*Non est factum.*] The burden of proving the bond, as we have seen, lies on the plt. If deft. has any evidence in disproof, he should adduce it; and if deft. has any other matter of defence under this plea, which we have seen may be given in evidence under it, he should adduce such evidence accordingly. If there be a variance, plt. will be nonsuited under this plea. As to evidence that the bond was taken after the return-day of writ, see *post*, 197, evidence under "*Ease and Favour.*" As to evidence of alteration, *ante*, 76. See "*Bond,*" "*Coverture,*" "*Lunacy,*" "*Drunkenness.*"

*Comperuit ad Diem.*] This plea is to be tried by the record of appearance, *Austen v. Fenton*, 1 *Taunt.* 23; the proof of which lies on deft.: *ante*, 195.

*No such Process as stated in Declaration issued against Principal.*] Plt. must prove the process. Under this plea deft. may avail himself of any variance in the writ, and that stated in declaration: as to what a variance, *ante*, 188, as, if it appear that the writ alleged in the declaration and that \*produced were returnable on different [\*197] days, or in different courts, &c.: *Bonfellow v. Steward*, 3 *Moo.* 214; *Baker v. Newbegin*, *R. & M.* 93; *Impey v. Taylor*, 3 *M. & S.* 166; *ante*, 188. But any trifling informality or variance in the writ, as to the description of the plea. &c., or of the time or place of appearance stated in the condition of the bond, &c., will not be prejudicial: *Luckett v. Plummer*, 2 *B. & B.* 659; 5 *Moo.* 538, *s. c.*; *Owen v. Nail*, 6 *T. R.* 705; 2 *Show*, 51; *Cro. J.* 286.

*Debt levied on Principal.*] The deft. must in this case prove the *fieri facias* and levy, as stated in his plea: see "*Writ;*" see form of plea, 3 *Chit. Pl.* 980.

*Ease and Favour.*] If issue be taken on the due execution of the bond, under this plea, slight evidence will suffice, *prima-facie*, to support it: 1 *Sid.* 384; 1 *Saund.* 163, *n.* The deft. must support his plea

by proving the exact day the writ was returnable, and showing that the bond was executed previous to that time. In order to prove the issuing and return-day of the writ, an office-copy should be produced in evidence. It is not sufficient to produce the præcipe in the filacer's book, and to prove a notice to produce the writ, unless it be shown that search has been made at the Treasury, and that, subsequent to the return-day, the writ has been seen in the possession of the opposite party: *Edmonstone v. Plaisted*, 4 *Esp. Rep.* 160; *Petersdorff on Bail*, 264.



## BANK NOTE.

See Index, "BANK NOTE."



## BANKRUPT.

UNDER this title will be considered the pleadings and evidence—I. In actions by assignees of a bankrupt; II. In actions against assignees; III. In actions by bankrupt; IV. In actions against bankrupt.

## I. ACTIONS BY ASSIGNEES.

*Form of Remedy*, 198.

*Assumpsit, Debt, Covenant*, 198-9.

*Trover, Trespass, Ejectment, &c.*, 199-200.

*Pleas*, 201.

*Form of Pleadings*, *ib.*

*Declaration*, *ib.*

*Plea*, 203.

*Precedents*, *ib.*

*Indebitatus Assumpsit*, *ib.*

*Trover*, 205.

*Evidence for Plaintiff*, *ib.*

*Title to Sue*, 206 to 207.

*Mode of proving Title*, 208.

*Notice to dispute Commission, &c.*, *ib.*

*Commission*, *ib.*

*Assignment*, 209.

*Bargain and Sale*, *ib.*

*When Depositions conclusive Evidence*, *ib.*

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*Act of Bankruptcy*, 221, &c.

[\*198] \* *Cause of Action*, 236—*To recover Personal Property*, *ib.*—*Debts, Choses in Action, &c.*, *ib.*—*Property in Possession of Bankrupt as reputed Owner*, 237—*Property delivered in Contemplation of Bankruptcy*, 238—*Pro-*

*perty delivered Voluntarily, without Consideration*, 239—  
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*Evidence for Defendant—Disputing Title—Payments, &c. —Set-off.*  
*Competency of Witnesses—Admissibility in Evidence of Depositions and Proceedings, &c.*

### *Form of Remedy.*

THE assignment and bargain and sale under the Statute of Bankruptcy vests in the assignees the bankrupt's property from the act of bankruptcy, and with it also all rights and remedies which the bankrupt had in relation to it, before such act of bankruptcy, and all rights and remedies which they, as owners in their own right, should have after such act. The form of remedy, therefore, will be the same as in other cases.

*Assumpsit* lies by the assignees against any person who has received money which ought to be paid to them, on the ground of an implied privity of contract; as the party receiving the money is supposed in justice to have received the same for the use of the assignees, and to have *promised* to pay them: *Kitchen v. Campbell*, 3 *Wils.* 307. Thus, they may maintain an action for money had and received against a banker, for money received by him, and paid over to a creditor of the bankrupt, with knowledge of the bankruptcy; but, after having recovered it from the banker, they cannot resort to the creditor; for they cannot affirm and disaffirm the same transaction: *Vernon v. Hankey*, 2 *T. R.* 113; *Vernon v. Anson, ib.*, 287. So, an action for money had and received lies where a creditor has levied his debt by *fi. fa.*, subsequent to the act of bankruptcy: *Hitchen v. Campbell*, 2 *W. Bla. R.* 827; 3 *Wils.* 304, *s. c.* Where the goods of a trader, after his act of bankruptcy, are taken in custody, or otherwise disposed of, without the consent of the assignees, they may waive the tort, and proceed in *assumpsit* for money had and received, if the goods have been sold: *ib.*; *Boyster v. Dodsworth*, 6 *T. R.* 681. And it has been held it lies against a debt., who took the goods of the bankrupt in execution after an act of bankruptcy, and then took the goods under a bill of sale from the sheriff, although no money was actually paid: *Reed v. James*, 1 *Stark.* 134. It lies to recover money paid by a bankrupt by way of fraudulent preference, *Edmeads v. Newman*, 1 *B. & C.* 418, 2 *D. & R.* 568; also, against a person who, after the arrest, and before the expiration of the limited time of imprisonment, having *had notice* that a commission would be sued out against the trader, sold his goods, and paid him the produce, *King v. Leith*, 2 *T. R.* 141, 3 *Camp.* 186; or against a creditor residing in this country, who knew of the assignment of the bankrupt's estate, *Hunter v. Potts*, 4 *T. R.* 182, 2 *H. Bla.* 402; or if he knew of an act of bankruptcy committed, though before an assignment,



and attached money belonging to the bankrupt: *Sill v. Worswick*, 1 *H. Bla.* 665; *Harvey v. Liddeard*, 1 *Stark.* 128. Where a bankrupt, after an act of bankruptcy, contracted with a factor, to whom he had delivered goods for sale, and who had accepted a bill upon the strength of the goods, to return the bill if he would return the goods, and he accordingly did return the bill, it was held they might adopt the contract, and recover against the factor for the non-delivery of the goods: *Butler v. Carver*, 2 *Stark.* 433. On the other hand, assignees cannot maintain an action for money had and received against a landlord, for money paid to him for rent by the bankrupt, after an act of bankruptcy, from the landlord's being about to distrain for it; for [\*199] he had a legal lien \*for it upon the goods in the bankrupt's possession at the time: *Stevenson v. Wood*, 5 *Esp. Rep.* 200. Nor will an action lie for money had and received against a person who was merely the bearer of the money from a third person to the bankrupt, after the act of bankruptcy, *Coles v. Wright*, 4 *Taunt.* 198; nor will it lie for money received by a creditor in payment of a bill of exchange, endorsed to him by the bankrupt after an act of bankruptcy, though trover will, *Waller v. Drakeford*, 1 *Stark.* 481; nor will it lie for the amount of India stock transferred by a trader after an act of bankruptcy, as in that case no money has, in fact, been received: *Nightingal v. Devisme*, 5 *Burr.* 2589; *Arch. B.* 252. And it has been held, that the assignees cannot recover for money had and received to their use, against a person who has received money from a bankrupt before his bankruptcy, it having been paid in consideration of putting off a trial for perjury, as it was held that it ought not to be considered an illegal and corrupt agreement: *Harvey & or. v. Morgan*, 2 *Stark.* 17. And, where A. deposited policies of insurance with his bankers, as security for a debt which B., a creditor afterwards obtained, upon an undertaking to settle with the underwriters, and collect for them, B. received the amount, but A. becoming bankrupt, and indebted to him in a larger sum, he refused to pay over the money, it was held, that A.'s assignee, even with the banker's consent, could not sue B. for the breach of the undertaking: *Chalmers v. Page*, 3 *B. & A.* 697.

It should be observed, that, by declaring in assumpsit, the assignees elect to affirm the contract of the bankrupt, which is made after his act of bankruptcy, such contract being only voidable or not at their election. In some cases, where the claim is not for a mere money demand, it may be more beneficial to them to disaffirm the contract, and sue for the tort: see *post*, 200. We have already seen, the assignees cannot affirm as well as disaffirm the same transaction, *ante*, 198.

*Debt* may be maintained by the assignees of a bankrupt, and they may sue either in the *debet* or *detinet*, as the whole of the bankrupt's property is vested in them: *Winter v. Kretchman*, 2 *T. R.* 46. So they may sue in debt on 9 *Anne*, c. 14, against the winner of money lost at play by the bankrupt, *Brandon v. Pate*, 2 *H. Bla.* 308, *Carter v. Abbott*, 1 *B. & C.* 444, 2 *D. & R.* 575; or for the penalty against a person swearing to a false oath, *Holmes v. Walsh*, 7 *T. R.* 458.

*Covenant* may also be supported by assignees; and as they succeed to all the rights of the bankrupt, they are entitled to the benefit of any estoppel, in the same manner as the bankrupt would have been: *Parker v. Manning*, 7 T. R. 537; *ante*, 50.

*Trover* lies to recover goods which the deft. has converted to his own use, whether before or after the bankruptcy, or which remain in specie: *Bloxam & or. v. Hubbard*, 5 East, 407; *Cumming v. Roebuck*, *Holt's C.* 172. Trover may be supported against a sheriff who levies and sells the bankrupt's goods after an act of bankruptcy; and though before the commission, or any notice: *Cooper v. Chitty*, 2 Burr. 20; 1 W. Bla. 65, s. c.; 4 M. & S. 260; *Smith v. Mills*, 1 T. R. 475. So it lies against him, though he only receives the goods: *Wyatt v. Blades*, 3 Camp. 395. So trover lies against the party suing out the execution, if he be a party to the conversion, as if he accompany the officer in levying, even although the produce of the goods remain in the hands of the sheriff, or his broker, *Menham v. Edmonson*, 1 B. & P. 369; and it lies against him if he received the produce from the sheriff upon giving a bond of indemnity, *Rush v. Baker*, 2 Str. 996; and trover lies for goods sold upon an invalid execution, subsequent to a sale upon a valid one, *Stead v. Gascoigne*, 8 Taunt. 527; and it lies against a servant receiving goods for his master, after an act of bankruptcy, committed by the owner, although he has accounted with his master for the produce: *Perkins v. Smith*, Say. 40; 1 Ld. Raym. 724. [\*200] And it is the proper action to recover the value of a bill of exchange, endorsed by the bankrupt to a creditor, after an act of bankruptcy, although he have since received payment of it, *Waller v. Drakeford*, 1 Stark. 481; but see *Thomason v. Frere*, 10 East, 418. So, if any person, during a bankrupt's examination, take any thing out of his effects, and convert it into money, even for the necessary subsistence of the bankrupt and his family, the assignees may recover the value of it in an action of trover against him. *Thompson v. Counsell*, 1 T. R. 157. So, assignees may maintain trover for goods sold by the bankrupt after an act of bankruptcy, although they have not demanded payment of them; for the very taking of goods from one who has no right to dispose of them, is of itself a conversion: *Hurst v. Gwennap*, 2 Stark. 306; and see *Bull. N. P.* 41. Trover lies for goods collusively sold to a creditor before an act of bankruptcy, but in contemplation of bankruptcy, and with a view of giving him a fraudulent preference; there must, however, be either a demand and refusal, or an actual conversion, to enable the assignees to maintain the action: *Nixon v. Jenkins*, 2 H. Bl. 135. Where the goods of a trader are, after an act of bankruptcy, and before the issuing of the commission, taken by a third person, the assignees' remedy is trover; if sold by the bankrupt, the assignees may bring trover against the vendee; if sold by such third person for the bankrupt, the assignees may recover the value of the goods in trover against the seller: *King v. Leith*, 2 T. R. 141; *Wilson v. Poulter*, 2 Str. 859. But it does not lie where the bankrupt, after his bankruptcy, drew a check on his banker, in favour of a creditor to whom the money was paid, to recover the amount of the check against the

creditor, the action proceeding on the ground, that the check was worth nothing but the paper: *Mathew v. Sherwell*, 2 Taunt. 439; *Walker v. Long*, 7 ib. 568; 1 Moo. 281, s. c. And where a bankrupt assigned a policy of insurance to the deft., but the company, upon its being afterwards discovered to be invalid, paid to the deft. half the sum insured, as a gratuity on his giving up the policy, it was decided that the value of the parchment only, and not the sum gratuitously paid, was recoverable in trover: *Wills v. Wells*, 8 Taunt. 264; 2 Moo. 247. s. c.

It is generally more advisable for the assignees to proceed in trover; for, if the goods have been sold, "the plt. may recover in trover the full value of the goods, deducting the ordinary expenses of a sale, though the sale may not actually have produced more than half their worth, but, in assumpsit, the assignees can only recover what the party really received," p. *Buller, J., King v. Leith*, 2 T. R. 144; and also, because by proceeding in trover, they are not compelled to affirm the contract, as in assumpsit, "and having once treated the transaction as a contract of sale, they must pursue it through all its consequences, one of which is, that the party buying may set off another debt owing to him:" *Smith v. Hodson*, 4 T. R. 217. It is also advisable, in many cases, to adopt the action of trover in preference to an action *ex contractu*, as, in trover, the deft. cannot set off any debt due to him by the bankrupt; *Wilkins v. Carmichael*, 1 Doug. 101; *Raphael v. Birdwood*, 5 Price, 604; *sed quære*, if the form of action makes any difference in this latter respect: see *Key v. Flint*, 1 Moo. 451; 8 Taunt. 21, s. c.

*Trespass* will lie at the suit of the assignees for an injury to, or amotion of the property, if they have obtained actual possession of it under the assignment, but they cannot support it before they have obtained such possession: *Clark v. Calvert*, 3 Moo. 96; 1 Glyn. & J., 147. It will not lie against a sheriff for taking the bankrupt's goods in execution, after the act of bankruptcy, and before the issuing of the commission; the assignees, in such case should bring trover: *Smith v. Mills*, 1 T. R. 475; *Burr*. 20.

*\*Ejectment.\** The assignees may support an action of ejectment, but the bargain and sale by the commissioners of the assignees of a bankrupt of the bankrupt's freehold lands, does not relate to the act of bankruptcy, so as to vest the title in the assignees, from that time, and, therefore, they cannot lay the demise before the date of the bargain and sale, by which the commissioners convey to them: *Doe d. Esdate v. Mitchell*, 2 M. & S. 446.

*Pleas to Action by Assignees.* Every matter may be pleaded to an action by assignees, that may be pleaded to a suit between the original parties; therefore, if the cause of action accrued before the act of bankruptcy, deft. may set up every defence he could have done for the same cause of action by the trader, if he had not become a bankrupt: *Dobson v. Lockhart*, 5 T. R. 132. Where A. gave a trader a bond to secure an annuity, before any payment became due, A. lent the trader a sum of money, and it was agreed that A. should retain the payments of the

annuity, until the sum lent was discharged; in an action by the assignees of the trader (who had become bankrupt), against A. for arrears of the annuity, it was holden that this agreement to retain was a good defence to the action, even as to payments of the annuity, accruing due after the bankruptcy, as it was equivalent to a plea of *solvit ad diem*: *Sturdy v. Arnaud*, 3 T. R. 599. Deft. cannot plead *nil habuit in tenementis*, to an action of covenant by the assignees for rent, for, as they succeed to all rights of the bankrupt, they may consequently claim the benefit of that estoppel, which would have operated between the lessor and lessee: *Parker v. Manning*, 7 T. R. 537. The deft. may plead a set-off, see *post*, 206, or the statute of limitations, *post*. Such statute begins to run from the accruing of the original cause of action: 1 Str. 556. In *Kitchen v. Campbell*, 3 Wils. 304, 2 W. Bla. Rep. 827, it was held, that to an action of *indebitatus assumpsit*, for the value of goods, a judgment for the deft. in *trover*, for the same goods might be pleaded in bar. A judgment of nonsuit, however, in an action of *trover*, would be no plea to an action for money had and received: *Walker v. Laing*, 1 Moo. 286, n.; *Eden*, 314.

If the cause of action accrued after the act of bankruptcy, and the subject of it past to the assignees under the assignment, except disputing the bankruptcy, the deft. can set up no defence, though he might have done so, if the action were brought, and would lie, at the suit of the assignees, in their individual capacity: *Arch. Bank*. 257. A release executed by the bankrupt, after an act of bankruptcy, to a relessee, who knows of the bankrupt's insolvency, is not valid, and, consequently, cannot be pleaded as a defence, although executed more than two months before the suing-out of the commission: *Mavor v. Pyne*, 3 Bing. 285. If the deft. intends disputing the commission, he should give a notice thereof, at or before pleading: *post*. 207.

### Form of Pleadings.

**Declaration.]** In an action by assignees in that character, it is usual for them to allege their title, by stating themselves generally to be such in the beginning of the declaration, and to state generally, that the bankrupt was such, within the meaning of the stat., *Winter v. Kretchman*, 2 T. R. 45; and this form of declaring, without setting out the petitioning creditor's debt, the proceedings of the commissioners, &c. is sufficient, *Lawson v. Lamb*, 1 Lutw. 274; 2 Ld. Raym. 1548; *Carth*. 29; *Fletcher v. Pogson*, 3 B. & C. 192; 5 D. & R. 1. Where the cause of action arose, to the bankrupt, previously to the bankruptcy, and the bankrupt himself could have recovered, the assignees *must* declare as assignees, and so describe themselves in the declaration; but, if it arose after the act of bankruptcy, and either before or after the issuing of the commission, so that the sum to be recovered \*would belong to the estate, they *may* sue and [\*202] declare in their individual capacity, as in their own right, without describing themselves as assignees: *Evans v. Mann*, Cowp. 569; *Malby v. Christie*, 1 Esp. Rep. 341; *Thomas v. Rideing*, 1 Wight. 65; 1 Rose, 181; 2 Chit. Rep. 325. Where the assignees,

under a joint commission, sue for a separate debt due to one of the partners, they may describe themselves as the assignees of that partner only: *Stonehouse v. De Silva*, 3 *Camp.* 399. In an action by the assignees of two partners, bankrupts, if the declaration contains counts on debts which accrued to the partners jointly before their bankruptcy, and counts on debts which accrued to one of them separately, it is sufficient, and it is not essential for them to state whether the debt is indebted to them as assignees of the two partners, or only of one, as under a joint commission against the two, for they may recover in the same action debts due to the partners jointly, and debts due to them separately: *Graham v. Mulcaster*, 4 *Bing.* 115. Where the assignees under separate commissions against two or more persons, sue jointly, they should not describe themselves as assignees of all the bankrupts, but each set of assignees must be distinctly described as the assignees of the bankrupt whom they represent: *Ray v. Davies*, 8 *Taunt.* 134; 2 *Moo.* 3, *s. c.* Where A. and B., who were assignees of C. and D., bankrupts, under separate commissions, sued in one action for debts due individually to C. and D., it was held the action could not be supported, there being no priority with respect to such separate demands: and, as the bankrupts could not have sued in this form, the assignees could not recover more than the persons they represented: *Hancock v. Haywood*, 3 *T. R.* 493; *ib.* 770. Where one of two partners became bankrupt before the other, the assignees, under a joint commission in an action for money paid to the debt. after the first, but before the second act of bankruptcy, declared for money had and received, to the use of the partners before their bankruptcy, and for money had and received to their own use as assignees, after the bankruptcy, it was held that they could not recover, though it would seem that, had they declared as assignees of A., they might have recovered a moiety of the money paid: *Smith v. Goddard*, 3 *B. & P.* 465. In an action of covenant for rent accrued since the bankruptcy, it is no objection, on a general demurrer, that the assignees have not set forth their title: 7 *T. R.* 537. In declaring on a *sci. fa.* by the assignees, it may be stated generally that the bankrupt became such within the meaning of the statutes, &c., that his goods, &c., were assigned to them, &c.: *Winter v. Kretchman*, 2 *T. R.* 45; *Fletcher v. Pogson*, 3 *B. & C.* 192; 5 *D. & R.* 1, *s. c.* In an action by a new assignee upon a judgment recovered by a removed assignee, it is sufficient to state the removal of the former assignee, and that the new assignee was *duly* constituted and appointed: 10 *East*, 61. As to the non-joinder of an assignee or solvent partner, see *post*.

The cause of action should be stated, as it accrued to the bankrupt or to the assignees: *Schw. N. P.* 239. An assignee ought, in assumpsit, to state the promise, as if made to the bankrupt, unless an express promise be made to the assignee; but he may declare in his own name for money had and received after the assignment, *anpn.* 6 *Mod.* 131, though the promise may always be laid to have been made to the bankrupt: *Rig v. Wilmer*, 1 *Str.* 697. Where the plts. sue as assignees of several bankrupts, for money had and received, and part of the money was received before the bankruptcy of either parties, and part after the bankruptcy of one, and before that of the others, the counts must be framed according-

ly: *Smith v. Goddard*, 3 B. & P. 465. Where the declaration alleged an account stated with the bankrupt, and promises to the assignees, and the evidence was of an account stated with the bankrupt, and promises to him, it was held sufficient: *Skinner v. Rebon*, 1 Selw. N. P. 239. It has been held, that where a levy of bankrupt's goods, after bankruptcy, was valid, by 49 G. 3, c. 121, s. 2, a description of such goods, as of the bankrupt, in "an action by the assignees, in consequence of such levy, was good: *Sampson v. Buxton*, 4 Moo. 515; 2 B. & B. 89. In an action to recover £20 per cent. under the act, the plt. must declare specially as for a penalty, unless the commissioners have settled an amount, charging the assignees with such interest: *Beresford v. Birch*, 1 C. & P. 373.

The declaration must not contain counts with claims arising out of different rights; otherwise it would be bad on a general demurrer, or in arrest of judgment, or upon error: 2 B. & P. 424; 4 T. R. 347; 2 Chit. Rep. 697; 1 Chit. P. 187. Therefore, as we have already seen, the assignees of A., a bankrupt, and also of B., a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the deft., to both the partners, and also separate debts due to each: 3 T. R. 433; and see further, *ante*, 202. Counts for money lent by the assignees of a bankrupt, may be joined with counts for money lent by the bankrupt himself: 5 M. & S. 294; 2 Chit. Rep. 325.

*Plea.*] There is nothing peculiar relating to the form of the plea. With respect, however, to a defence of set-off, the same may be given in evidence, under the general issue, without a plea or notice of it: 1 T. R. 115; 6 T. R. 58; *Montague*, 61. In practice, however, it is most usual to give a notice, or plead the set-off.

### Precedents.

#### COMMENCEMENT OF DECLARATION IN K. B., ATTS. ASSIGNEES.

Ellenborough.

Michaelmas Term, 8 Geo. 4.

Middlesex to wit, (*venue.*) A. B. and C. D., the plts. in this suit, assignees of the estate and effects of E. F., a bankrupt, according to the force, form, and effect of the statute in force concerning bankrupts, complain of G. H., the deft. in this suit, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case upon promises (*or as the plea is.*) For that, &c.

#### THE LIKE IN C. P.

In the Common Pleas.

Michaelmas Term, 8 Geo. 4.

Middlesex to wit, (*venue.*) E. F., the deft. in this suit, was attached to answer A. B. and C. D., the plts. in this suit, assignees of the estate and effects of G. H., a bankrupt, according to the force, form, and effect of the statute in force concerning bankrupts, of a plea of trespass on the case upon promises, (*as the plea is.*) and thereupon the said A. B. and C. D., by their attorney, complain. For that, &c.

#### INDEBITATUS ASSUMPSIT ON PROMISES TO THE BANKRUPT.

For that whereas (*or, if this be not the first count, say, "and whereas also"*) the said deft., heretofore, and before the said G. H. became a bankrupt, (to wit) on the 1st day

of January, A. D. 1828 (*any day before the bankruptcy, but even this is not material*), at London (*venue*), was indebted to the said G. H. in the sum of £100, of lawful money of Great Britain, for divers goods, wares and merchandises by the said G. H., before that time sold and delivered to the said deft., at his special instance and request. And, being so indebted, he the said deft. in consideration thereof, afterwards, and before the bankruptcy of the said G. H., (to wit) on the same day and year aforesaid (or, "*last aforesaid*"), at London (*venue*) aforesaid, undertook, and then and there faithfully promised the said G. H., to pay him the said sum of £100, whenever afterwards he, the said deft., should be thereunto requested. And whereas also, &c. (*other counts may be readily framed on promises to the bankrupt, on the same principle as the preceding one, stating all the promises and causes of action to have accrued before the bankruptcy. The account stated, and breach of promises to the bankrupt, is as follows :*)

## ACCOUNT STATED.

[\*204] And whereas, also, the said deft. afterwards, and before the bankruptcy \*of the said G. H. (to wit) on the same day and year aforesaid, at London aforesaid, accounted with the said G. H. of and concerning divers other sums of money, from the said deft. to the said G. H. before that time due and owing, and then in arrear and unpaid. And upon that account, the said deft. was then and there found to be in arrear and indebted to the said G. H. in the further sum of £100, of like lawful money; and, being so found in arrear and indebted, as last aforesaid, he, the said deft. in consideration thereof, afterwards, and before the bankruptcy of the said G. H., (to wit) on the same day and year aforesaid, at London aforesaid, undertook, and then and there faithfully promised the said G. H., to pay to him the said sum of money last mentioned, whenever afterwards he, the said deft. should be thereunto requested. Yet the said deft. not regarding his said several promises and undertakings, so by him in manner and form aforesaid made, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said G. H. before he became a bankrupt, and the said plts. as assignees as aforesaid, after the said G. H. became a bankrupt, in this respect hath not yet paid the said several sums of money, nor any or either of them, nor any part thereof, to the said G. H., before he became a bankrupt, or to the said plts., since he became a bankrupt, although often requested so to do. But the said deft. to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse to pay the same to the said plts. as assignees as aforesaid, or otherwise. (*If there be the least ground for presuming there has been a promise to the plts. as assignees, counts should be inserted to meet the same, and especially the account stated as infra.*) To the damage of the plts., as assignees as aforesaid, of £100; and therefore they bring their suit, &c. Pledges, &c.

## INDEBITATUS ASSUMPSIT ON PROMISES TO THE ASSIGNEES, FOR A DEBT ACCRUING BEFORE THE ACT OF BANKRUPTCY.

And whereas also the said deft., after the said G. H. became bankrupt, to wit, on the first day of January, in the year of our Lord 1828, (*any day after the bankruptcy, but even this is not material*), at London aforesaid, was indebted to the said plts., as assignees as aforesaid, in the sum of £100, of like lawful money, for divers goods, wares and merchandises of the said G. H., before his bankruptcy, sold and delivered to the said deft., and at his like special instance and request. And, being so indebted, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at London aforesaid, undertook, and then and there faithfully promised the said plts., as assignees as aforesaid, to pay them the said last-mentioned sum of money, when he, the said deft., should be thereunto afterwards requested. (*Other counts may be readily framed on other causes of action, on the principle of the preceding one. It is not, however, usual, nor perhaps necessary, to insert any other count than the account stated as follows, unless there has been some distinct cause of action, as goods sold, or money lent, &c., after the act of bankruptcy, and when this, and counts as post, 205, first precedent, should be added.*)

## ACCOUNT STATED WITH ASSIGNEES.

And whereas also the said deft., afterwards, and after the bankruptcy of the said G. H., to wit, on the same day and year aforesaid, at London aforesaid, accounted with the said plts., as assignees as aforesaid, of and concerning divers other sums of money from the said deft. to the said plts., as assignees as aforesaid, before that time due and owing, and then in arrear and unpaid. And, upon that account, the said deft. was then and there found to be in arrear, and indebted to the said plts., as assignees as aforesaid, in the fur-

ther sum of £100, of like lawful money. And, being so found in arrear and indebted, the said deft., in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, undertook, and then and there faithfully promised the said plts., as assignees as aforesaid, to pay them the said sum of money last mentioned, whenever afterwards he, the said deft., should be thereunto requested. Yet the said deft., not regarding the said several promises and undertakings, in the said last — counts mentioned, so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plts., as assignees as aforesaid, in this respect, hath not yet paid the \* said [\*205] several sums of money in the last counts mentioned, or either of them, or any part thereof, to the said plts., although often requested so to do. But the said deft., to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse, to the damage of the said plts., as assignees as aforesaid, of £100; and therefore they bring their suit, &c. Pledges, &c.

INDEBITATUS ASSUMPSIT ON PROMISES TO THE ASSIGNEES, ON CAUSES OF ACTION  
ACCRUING SINCE THE ACT OF BANKRUPTCY.

And whereas, also, the said deft., after the said G. H. became a bankrupt, to wit, on the first day of January, in the year of our Lord 1828, at London aforesaid, was indebted to the said plts., as assignees as aforesaid, in the sum of £100, of lawful money of Great Britain, for divers goods, wares, and merchandises, by the said plts., as assignees as aforesaid, before then, and after the bankruptcy of the said G. H., sold and delivered to the said deft., at his special instance and request. And being so indebted, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at London aforesaid, undertook, and then and there faithfully promised the said plts., as assignees as aforesaid, to pay them the last-mentioned sum of money, when he, the said deft., should be thereunto afterwards requested. (*Other counts may be readily framed, on causes of action accruing after the bankruptcy, on the principle of the preceding count. Care should be taken to insert a count for money had and received to the use of the assignees. The account stated is as ante, 204.*)

See a form at the suit of a surviving assignee, 2 *Chit. Pl.* 100; also by one partner, and the assignee of another, being bankrupt, for work done before the bankruptcy, *ib.* 101; on note payable to bankrupt, *ib.* 137; by assignee of indorsee against acceptor, *ib.* 165; against drawer, where bill dishonoured after bankruptcy, *ib.*

TROVER BY ASSIGNEES ON THE BANKRUPT'S POSSESSION, AND A CONVERSION AFTER THE  
BANKRUPTCY.

For that whereas the said G. H., heretofore and before he became a bankrupt, to wit, on the first day of January, in the year of our Lord 1828 (*some day before the bankruptcy, but even this is not material*), at London (*venue*), was lawfully possessed, as of his own property, of certain goods and chattels, to wit (*state the property as usual, post, "Trove"*), of great value, to wit, of the value of £100, of lawful money of Great Britain; and, being possessed thereof, he, the said G. H., afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, at London (*venue*) aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, at London (*venue*) aforesaid, came to the possession of the said deft. by finding. Yet the said deft., well knowing the said goods and chattels to be the property of the said G. H., before he became a bankrupt, and of right to belong and appertain to him before his bankruptcy, and to the said plts., as assignees as aforesaid, after such bankruptcy; but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said G. H. before he became a bankrupt, and the said plts., as assignees as aforesaid, since the said G. H. became a bankrupt, in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said G. H. before his bankruptcy, or to the said plts. since, although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, and after the said G. H. became a bankrupt, to wit, on the second day of January, in the year aforesaid (*any day after the bankruptcy*), at London (*venue*) aforesaid, converted and disposed of the said goods and chattels to his, the said deft.'s own use. (*If the conversion was before the act of bankruptcy, a count should be inserted to meet same accordingly. It is also advisable to insert the following count.*)



## TROVER ON THE ASSIGNEES' POSSESSION AND CONVERSION AFTERWARDS.

And whereas also the said plts., as such assignees as aforesaid, heretofore, and after the said G. H. became a bankrupt, to wit, on the first day of January, in the year of our Lord 1828 (*any day after the bankruptcy, but even this is not material*), at London (*venue*) aforesaid, was lawfully possessed, as of the property of the said plts., as assignees aforesaid, of "certain other goods and chattels, to wit, &c. (*describe goods as usual in trover, post, "Trover"*) of great value, to wit, of the value of £100, of lawful money of Great Britain, (*or, if this be not the first count describing the goods, say "goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned"*); and being possessed thereof, they, the said plts., afterwards, to wit, on the day and year last aforesaid, at London aforesaid, casually lost the said last-mentioned goods and chattels out of their possession; and the same afterwards, to wit, on the day and year last aforesaid, at London aforesaid, came to the possession of the said deft. by finding; yet the said deft., well knowing the said last-mentioned goods and chattels to be the property of the said plts., as such assignees as aforesaid, and of right to belong and appertain to them as such, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plts., as such assignees as aforesaid, in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the said plts., although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, at London aforesaid, converted and disposed of the said last-mentioned goods and chattels to his, the said deft.'s own use; to the damage of the said plts., as such assignees as aforesaid, of £100, (*insert enough to cover full value of goods*); and therefore they bring their suit, &c. Pledges, &c.

## PLEAS. SET-OFF.

*Pleas.*] The forms of pleas are the same for the most part as in ordinary cases. A plea or notice of set-off, may be readily framed, stating, that "the bankrupt, at the time of the bankruptcy, was indebted," &c.; and omitting the words, "before and at the time of the commencement of the suit, was, and still is," and, after setting forth the subject-matter of the debt in the usual form, alleging, "which said sum of money is still wholly due and unpaid, and unsatisfied; and the said plts., as assignees as aforesaid, before and at the time of the commencement of this suit, were and still are, indebted to the said deft. in the amount thereof." See 3 *Chit. Pl.* 933; *post*, "Set-off."

## Evidence for Plaintiff.

*Proof of TITLE to sue.*] The plts., when necessarily suing as assignees, were, in all actions, formerly obliged to substantiate their title to sue, by proving strictly all the requisites to support the commission, viz. the petitioning creditor's debt, the trading and act of bankruptcy, the issuing of the commission, and the assignment to the plts. But the law in this respect, as to the proof of the first three requisites, is materially modified; for, in some cases, no such proof is required, and in others the depositions before the commissioners are conclusive evidence. We shall consider those cases; 1. when proof of title is necessary; and, 2. the mode of proving such title.

1. *When Proof of Title is necessary.*] By section 90 of the new act, it is declared, that, in any action by or against an assignee, or any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, *no proof shall be required at the trial of the petitioning creditor's debt, the trading or act of bankruptcy*, unless the other party in such action shall (if deft. at or before pleading, and if plt. before the issue

joined) give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which, of such matters; and the party giving notice renders himself liable to the costs occasioned by it, if the disputed matter is proved by the other party upon the trial. Under this section, no proof whatever of the petitioning creditor's debt, the trading, or act of bankruptcy, is required, unless the proper notice be given, and this \* even though the proceedings appear [\*207] defective on the face of them: see 4 *Bingh.* 34. And, as we shall hereafter see, by the 92d section of the act, where the assignees sue for a debt or demand, for which the bankrupt himself might have sued, the debt, is deprived, in effect, from all power whatever of disputing those proceedings, after a certain period allowed the bankrupt to dispute the validity of the commission: see *post*.

It is to be observed, that this 90th section relates only to actions brought by or against the assignees or commissioners, or persons acting under their warrant. It, therefore, does not affect actions where such persons are not parties, and, in those cases where the validity of the commission comes incidentally in question, it must be regularly and strictly proved, as it used to be: *Doe v. Liston*, 4 *Taunt.* 741. The statute is not confined to cases where the assignees or the commissioners are named as such upon the record; it also extends to actions where the opposite party knows that they make out their title or their justification, as the case may be, under the commission: *Simmonds v. Knight*, 3 *Camp.* 251; *Rove v. Lant, Gow*, 24. It also extends to actions, though there are other debt's on the record, if these debts have justified as servants of the assignees: *Gilman v. Cousins*, 2 *Stark.* 182.

The notice required by the statute to compel the party to prove the proceedings therein mentioned, must be strictly conformable to the statute. As to the time of service of it, if on the part of the *plt.*, it must be before issue joined. But a notice delivered at the time of the delivering the issue, with notice of trial, is sufficient: *Richmond v. Heapy*, 4 *Camp.* 207. A notice by the *deft.* must be given at or before pleading. If he has omitted to give notice before pleading, and wishes to dispute the commission, his course would be to withdraw his plea, and plead *de novo*, with such notice: *Willock v. Smith*, 2 *Camp.* 184; *Decharme v. Lane*, 2 *Camp.* 324; *Radmore v. Gould*, *Wightw.* 80; *Gardner v. Slack*, 6 *Moore*, 489. But, he should, for this purpose, apply to the court, for he cannot regularly withdraw a plea once pleaded, and deliver it again, with a notice, even though the time for pleading has not expired: *Poole v. Bell*, 1 *Stark.* 328. With respect to the mode of service of the notice, service on the assignees in person, though the safest course, when practicable, is not absolutely necessary, a delivery of the notice to their attorney being sufficient, but leaving it with a servant at the dwelling-house even of the assignee, is not sufficient: *Howard v. Ramsbottom*, 3 *Taunt.* 526. The notice on the part of the *deft.* is not to be considered as part of his evidence in the cause, but should be proved at the beginning of the trial; and, as soon as the commissions and proceedings are produced by the *plt.*, the court will then immediately compel the latter to support the commission in the same manner as he was formerly obliged to do, viz. by strict proof of the petitioning creditor's debt,

and the other requisites: *Decharme v. Lane*, 2 *Camp.* 324. When notice has been given only to dispute the act of bankruptcy, and the other side have read the depositions on the file to prove the trading and debt, the residue of the proceedings are not considered to be evidence, and the counsel for the party contesting the commission has no right to inspect them: *Bluck v. Thorne*, 4 *Camp.* 191; *Stafford v. Clarke*, 1 *C. & P.* 26.

Proof of title of the assignees, will be dispensed with, in cases where deft. by his own act, has estopped himself from disputing it. As, where deft. had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, and afterwards made a part payment to the assignee, as such, on that account, it was held to be *prima-facie* evidence, that the plaintiff was assignee: *Dickenson v. Coward*, 1 *B. & A.* 677. So, if a deft., on being applied to by a person whom it is proved he knew to be the collector of the bankrupt's debts for the assignees, said he would call and pay the money, such promise was held *prima-facie* to dispense with the necessity of proving plt.'s [\*208] title: *Pope v. Monck*, \*2 *C. & P.* 112. In an action brought by the assignee to recover the price of goods received by deft. from the bankrupt before his bankruptcy, to sell by auction, and which he had sold after the bankruptcy, it was held that the deft., having described the goods in his catalogue of sale as "the property of D., a bankrupt," had estopped himself from calling the bankruptcy in question, and *prima-facie* dispensed with the necessity of proving the proceedings: *Maltby v. Christie*, 1 *Esp. Rep.* 340; 16 *East*, 193. In an action of debt on bond by assignees, a plea of payment only, admits their title, and they need not prove themselves to be assignees. See *Corsbie v. Oliver*, 1 *Stark.* 76, *ante*, 39, 40. Where the deft. has himself contracted with the assignees, or, as it seems, even with the deft. after the bankruptcy, they may, in that case, recover against him, without proving themselves to be such, *Evans v. Mann*, *Cowp.* 569; and this, although the plts. allege themselves in the declaration to be assignees: *Thomas v. Riding*, *Wightw.* 65. We have already considered how far the bankrupt, by his acts, will be estopped from disputing the commission, &c. *ante*, 46. The mere circumstance of a creditor's proving a debt under the commission, is not sufficient to preclude him from disputing its validity: *Rankin v. Horner*, 16 *East*, 191; *Stewart v. Richman*, 1 *Esp. Rep.* 108.

II. MODE OF PROVING TITLE OF PLAINTIFFS.] This will be considered with reference to cases—1. Where no notice has been given to dispute the title; 2. Where the commission has not been disputed by the bankrupt within a limited period after the adjudication; and, 3. Where a notice has been given to dispute the title, and the commission has been disputed by the bankrupt within such limited period, and where strict proof of title is required.

1. *Mode of proving Title, when no Notice has been given to dispute it.*] If no notice has been given by the opposite party to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, it will

be sufficient for the assignees, commissioners, or persons acting under their warrant, to prove the *commission* and the *assignment* only, and, in some cases, the bargain and sale, without any further proof. Such proof is, indeed, in all cases requisite, unless where the opposite party has admitted the plt.'s title, and in which case the admission must be proved: *ante*, 207. In all proceedings against the bankrupt, whether notice is given or not to dispute the commission, strict proof will be required of all the requisites to support it; and the depositions in this case will not be sufficient evidence: 3 *Camp.* 96; *Deacon, B. L.* 780, 1. As to plt.'s undertaking on retaining venue, see *Soulsby v. Lea*, 3 *Taunt.* 86. We shall now consider the mode of proving the commission, assignment, and bargain and sale.

*Commission.*] To prove the commission, the original commission under the great seal must be produced, and now, by section 96 of the statute, no *commission*, or *adjudication* of bankruptcy, or *assignment* of the personal estate of the bankrupt, or certificate of conformity, is receivable in evidence in any court of law or equity, unless the same respectively shall have been first entered of record at the Bankrupt Office. The great seal, therefore, of the kingdom, which has been hitherto considered the most solemn mode of authenticating any instrument, appears to be no longer sufficient evidence to verify a commission of bankruptcy; but the commission must now have a certificate endorsed thereon, purporting to be signed either by the person appointed by the Lord Chancellor to enter of record matters relating to commissions of bankruptcy, or by his deputy; which certificate is without any proof of the signature declared to be receivable as evidence of the commission having been so entered of record. When, however, a commission is superseded, the writ of *supersedeas* (reciting that a commission issued on a day certain) is evidence to show that \* such a commission issued on [\*209] that day, even against a party who is both a stranger to the writ and to the commission; for a commission of bankruptcy is considered in law as a proceeding to which all the world are parties: *Gervis v. Western Canal Company*, 5 *M. & S.* 76. No stamp is necessary: 6 *Geo.* 4, c. 16, s. 98; see *Deacon, B. L.* 774. As to a variance in stating commission, see *post*, pleadings in actions against bankrupt.

*Assignment.*] The assignment must be proved by producing the deed, and calling the attesting witnesses to prove the execution of it: *post*, "Deed." But, where the assignees produce the assignment under a notice from the other party, it is then admissible in evidence for that party, without proof of the execution by the subscribing witness, if the assignees claim any benefit under the assignment: *Pearce v. Hooper*, 3 *Taunt.* 62; *Orr v. Morice*, 3 *B. & B.* 139. The assignment must (as well as the commission) have the proper certificate endorsed of having been entered of record at the Bankrupt Office, before it can be read in evidence; *ante* 208. No stamp is necessary: 6 *Geo.* 4, c. 16, s. 98. By the courtesy of practice in the court of K. B., the assignment is in general admitted on the trial, unless there be substantial reasons to the contrary: *Read v. Cooper*, 5 *Taunt.* 89; *Deacon, B. L.* 775.

*Bargain and Sale.*] In actions relating to the bankrupt's *freehold property* (which does not pass by the general assignment of the commissioners), the title of the assignees is to be substantiated, by producing the bargain and sale to them from the commissioners, and proving its execution in the ordinary way. But, unless the commissioners execute the power with which they are invested, in the precise manner prescribed by the statute, it will have no effect in passing the estate: *Perry v. Bowes*, *Sir T. Jones*, 196; *Bennet v. Gaudy*, *Carth.* 178; *Elliott v. Danby*, 12 *Mod.* 3. The deed must therefore appear to have been enrolled in some court of record, *s.* 64; and this must be done within six months after the date of the deed, according to the express provision of the statute of the 27 *H. 8. c.* 16, relating to the enrolment of bargains and sales: 2 *Phill.* 288; see *Deacon, B. L.* 776. The enrolment may be proved by a certificate on the bargain and sale, signed by the proper officer, which will be evidence also of the time when it was enrolled, *Kinnersley v. Orpe*, 1 *Doug.* 56, 58; for the endorsement is considered as part of the enrolment, which, being a record, is therefore conclusive as to the time, *Rex v. Hopper*, 3 *Price*, 495; and, as the enrolment of the deed thus becomes a record, the deed may likewise be proved by an *examined copy* of the enrolment, signed by the proper officer; and the *time* of enrolment may, in like manner, be proved by an examined copy of the officer's endorsement on the enrolled deed: 1 *Phill.* 388, 499; 2 *ib.* 288; see *Deacon, B. L.* 776. The bargain and sale is exempt from stamp duty: 6 *Geo.* 4, *c.* 16, *s.* 98. No *stamp* is any longer necessary to give validity to the commission, or the assignment, or, indeed, to any other document, or conveyance relating *solely* to the estate or effects of the bankrupt.

2. *Mode of proving Plaintiff's Title, where the Commission has not been disputed by the Bankrupt within a limited period.*] By the 92d section of 6 *Geo.* 4, *c.* 16, it is declared, that, if the bankrupt shall not (if he be within the united kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if out of the kingdom), then within twelve calendar months, give notice of his intent to dispute the commission, and proceed therein with due diligence, the depositions taken before the commissioners of the petitioning creditor's debt, the trading, and act of bankruptcy, shall be *conclusive* evidence of the matters therein respectively contained, in all actions or suits brought by the assignees, for any debt or demand *for which the bankrupt might have sustained any action or suit.*

\*In order, therefore, to render the proceedings *not conclusive* [\*210] evidence of the facts therein stated, in an action for the recovery of that which *the bankrupt himself* might have sued for, if his bankruptcy had not taken place, the bankrupt must have given the notice pointed out in the above section, and within the limited time. But this need not have been done, if the proceedings, upon the face of them, do not contain *facts* which will amount to proof of the several matters required by law to constitute a good petitioning creditor's debt, trading, or act of bankruptcy: for mere conclusions of law, drawn by the witnesses or by the commissioners from the facts stated, are not sufficient to support the

commission; and, in such cases, the depositions are not *conclusive* evidence, and the opposite party may, by other facts, dispute the commission, see *Humphries v. Coggan*, 1 *Rose*, 226, *Clarke v. Askeu*, 1 *Stark*. 458; provided, indeed, he has first given the notice required by the 90th section; *ante*, 207; *Mackbeath v. Coates*, 4 *Bing*. 34. Where the debt is stated to be due from the bankrupt, as drawer of a bill of exchange, but the deposition states no notice of dishonour, it will not be conclusive evidence of the debt, which the other party, after notice to dispute, may dispute: *Cooper v. Machin*, 1 *Bing*. 426; 4 *Bing*. 34. So, if the deposition of the petitioning creditor state only that the debt was due to him at and before the time of suing forth the commission, not showing that it existed at the time of the act of bankruptcy, this is not conclusive proof of the goodness of the petitioning creditors' debt: *Clarke v. Askeu*, 1 *Stark*. 458; *Lawton v. Robinson*, *ib.* 456. If a deposition state that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to A. B., though this is evidence of such a deed, as stated in the deposition, it is not evidence that the deed itself was an act of bankruptcy: *Kay v. Stead*, 2 *Stark*. 200. Where the deposition, to prove the act of bankruptcy, stated that the party absented himself on a certain day, and that he had declared to the deponent that his motive was to avoid his creditors, but not stating the time when this declaration of the bankrupt was made, this was held not sufficient proof of an act of bankruptcy: *Marsh v. Meager*, 1 *Stark*. 353. And so, where the deposition omits to state that the party absented himself with an intent to delay his creditors: *Tolerman v. Jones*, 9 *Moo*. 24. The deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor or assignee; nor will it be necessary in either of these cases to produce the probate or the assignment; but, whether the sum due was a debt to support a commission, that is an inference of law which the court, upon the trial, will not be estopped from determining by the adjudication of the commissioners: *Skaipe v. Howard*, 2 *B. & C.* 560, 4 *D. & R.* 37; *Deacon*, *B. L.* 778. The whole effect, indeed, of the provision of the statute is only to make the depositions evidence, not to admit the fact of the bankruptcy to be proved; for this must be as strictly made out by the depositions, as it would be required to be done by the witnesses: *Rawson v. Haigh*, 1 *C. & P.* 80. If the facts stated in the depositions are sufficient of themselves to sustain the commission, no further proof is necessary; but they may always be objected to for not proving the subject-matter to which they apply: 2 *B. & C.* 560; 4 *D. & R.* 37; *Deacon*, *B. L.* 778, 9. We have already seen, if the opposite party to the depositions object on the latter ground to proceed, he must, to avail himself of such objection, give a notice to dispute, as required by the 90th section: *ante*, 207; 4 *Bing*. 34. It must be remembered, that an action brought by the assignees to recover back the payment of a debt made by the bankrupt to a creditor, after his knowledge of an act of bankruptcy, or after the issuing of the commission, for which the bankrupt himself could have no right to sue, would not be such an action as would deprive the debt. of his right at any time to dispute these matters, upon his giving

[\*211] the requisite notice of \*his intention so to do: *Deacon, B. L.* 777. The assignees, &c., may always support the commission by evidence *aliunde* the depositions: *Clarke v. Askew*, 1 *Stark*. 458, *n.*

The deposition of the petitioning creditor is admissible at the trial in proof of his debt, 2 *Camp.* 92; though, indeed, if he himself were called, he would not be a competent witness to support the commission: *Green v. Jones*, 2 *Camp.* 411; and see *Skaiſe v. Howard*, 2 *B. & C.* 560; 4 *D. & R.* 37. As to its being evidence of a party being executor, *post*, 215. In order to make the depositions, &c., evidence, it must be shown that they came out of the custody of the solicitor to the commission, or the handwriting of the commissioners must be proved, *Collinson v. Hillier*, 3 *Camp.* 30; and for which purpose the bankrupt himself, having obtained his certificate, and released the surplus, is a competent witness: *Morgan v. Price*, 2 *B. & C.* 14; 3 *D. & R.* 215; *post*, "Deed." And see further, as to the admissibility in evidence of the depositions and proceedings under the commission, in cases independent of the 92d sect. of the 6 *Geo.* 4, c. 16, *post*.

3. *Mode of proving Title, where a Notice has been given to dispute it, and the Commission has been disputed by the Bankrupt within the limited time; and, in other cases, where strict proof of Title is necessary.*] In such cases, where an assignee or party has to support a commission of bankruptcy by strict proof of the proceedings under it, he will have to prove the petitioning creditor's debt, the trading, the act of bankruptcy, the commission, the assignment, and some other proceedings; the proof of all which will be now considered.

PETITIONING CREDITOR'S DEBT.] This will be considered with reference to the amount of it, the subject-matter of it, the time when due, and the mode of proving it.

If the petitioning creditor's debt be a debt to one creditor, or to a firm, it must amount to £100; if it be to two, £150; and if to more, £200: 6 *Geo.* 4 c. 16, s. 15. Where a further debt is contracted by the bankrupt, after leaving off trade, and he makes a payment without directing to which debt it is to be applied, it will be taken to be applied to the old debt; and, if it be thereby reduced to a sum less than £100, it will not support a commission: *Meggott v. Mills*, 1 *Ld. Raym.* 286; *Comb.* 463, s. c. A creditor buying in notes to the amount of £100, at 10s. in the pound, has been considered to have a sufficient debt: *ex. p. Lee*, 1 *P. Wms.* 782. Where a creditor to an amount sufficient to support a commission, after notice of an act of bankruptcy, received a payment, diminishing the original debt to a sum insufficient to support the commission, it was held that, as that payment was void, there was still a good petitioning creditor's debt: *Mann v. Shepherd*, 6 *T. R.* 79; *ex. p. Miller*, *Buck.* 283. Where the debt was for a bill of exchange for £100, drawn and issued before the act of bankruptcy, but becoming due afterwards, it was objected that the sum of £100 was not due, but only that sum *minus* the rebate of interest; but it was held that the debt was sufficient to support the commission, upon the principle that the debt was contracted at the time the bill was given: *Brett v. Levett*, 13 *East*, 213.

In the case of a bill of exchange, where it is not expressed on the face of it that interest should be paid, it cannot be added, so as to make up a legal petitioning creditor's debt: *Cameron v. Smith*, 2 B. & A. 305; *ex. p. Burgess*, 2 Moo. 745; 8 Taunt. 660, s. c. A creditor who receives part of his demand after notice of an act of bankruptcy, which reduces his debt below, £100, is not thereby precluded from suing out a commission on the whole debt: *Mann v. Shepherd*, 6 T. R. 79; *Buck*, 283; *Brokerdike v. Bollman*, 1 T. R. 405; and see *infra*.

With respect to the *subject-matter* of the debt, the debt must be a *legal* one: a mere equitable claim will not support the commission: 1 Atk. 147; \*2 Ves. 407. A judgment creditor, who has [\*212] taken his debtor in execution, cannot afterwards sue out a commission of bankruptcy against him: *Cohen v. Cunningham*, 8 T. R. 123. But it is a good petitioning creditor's debt, though merged in a higher security: *Briant v. Withers*, 1 M. & S. 123; *Ambrose v. Clendon*, 2 Str. 1042. And a creditor entering into a composition-deed, after an act of bankruptcy committed by his debtor, is not precluded from being a petitioning creditor, in respect of the original debt: *Doe v. Anderson*, 5 M. & S. 161; and see *Ambrose v. Clendon*, 2 Str. 1042; *C. T. Hardw.* 267; *ante*. As to promissory note on wrong stamp, *ex. p. Geddes*, 1 G. & J. 414. A debt upon attorney's bill, though it has not been signed and delivered pursuant to the statute, is sufficient to support a commission, see *ex. p. Steele*, 16 Ves. 166, *ex. p. Howell*, 1 Rose, 312, *ex. p. Prideaux*, 1 G. & J. 28; and a debt, though barred by the Statute of Limitations, will be good, if the bankrupt himself make no objection to it: *Swayne v. Wallinger*, 2 Str. 746; *Quantock v. England*, 5 Burr. 2628; *Mavor v. Pyne*, 3 Bing. 265; *sed vide Gregory v. Hurrell*, 5 B. & C. 341.

The debt must be of such a nature, that an action at law might be brought for it by the petitioning creditor against the bankrupt. Where the debt is due to a partnership, it must appear that all the partners concurred in the proceeding. A commission cannot be supported on the petition of one only of two partners, to whom a joint debt is due, *Buckland v. Newsame*, 1 Taunt. 477, 1 Camp. 474, s. c.; but a separate commission may be taken out against one of several partners, on the petition of a joint creditor: *Crispie v. Perritt*, *Willes*, 467. One partner cannot sue out a commission against another for a partnership debt, except, perhaps, where accounts have been liquidated and the partnership determined that the creditor paid all the debts, *ex. p. Nokes*, 2 Mont. 144; but, for a debt not arising out of a partnership transaction, or where they are not equally concerned in the profit and the loss, one partner may sue out a commission against another, *Windham v. Paterson*, 1 Stark. 144; or, where the profit was equally to be divided between them, but the loss to be borne exclusively by one only: *Marston v. Barber*, *Gow*. C. 17. One of several assignees may sue out a commission in respect of a commission due their bankrupt, without the other assignees joining in the affidavit, &c.: *ex. p. Blakely*, 1 G. & J. 197. A husband alone cannot be a petitioning creditor in respect of a debt composed partly of a sum due to himself, in his own right, and partly to his wife, *Rumsey v. George*, 1 M. & S. 176; but, in the case of a bill of ex-



change, or promissory note, given to the wife *dum sola*, the husband may alone petition, for the right of the action, shifting with the possession of the bill, vests by marriage in the husband: *McNeilage v. Holloway*, 1 B. & A. 218; *ex. p. Barber*, 1 G. & J. 1. Proof of a debt due to an infant is not sufficient to support a commission, *ex. p. Barrow*, 3 Ves. 554, *ex. p. Morton, Buck*, 42, nor is a debt contracted by an infant; but proof of an acceptance after he came of age upon a bill drawn when he was an infant, was holden to be a good petitioning creditor's debt: *Stevens v. Jackson*, 4 Camp. 164. Though a public company have power by statute to "commence all actions and suits" in the name of their secretary, as the nominal plt., this does not enable the secretary to petition for a commission: *Guthrie v. Fisk*, 3 B. & C. 178; 5 D. & R. 24. Proof of the debt of a factor, selling goods in his own name, is sufficient to support a commission against the purchaser; but not so if it appear that, by agreement between the principal and factor, the former was to consider the purchaser as his debtor, as, by the intervention of the principal, the right of the factor was gone: *Sadler v. Leigh*, 4 Camp. 164. The debt of a natural-born subject, residing and trading in an enemy's country, will not support a commission: *McConnell v. Hector*, 3 B. & P. 113. The mere residence, however, will not affect the debt, if it do not appear that it was for the purpose of trading, and that the

[\*213] creditor went there \*with a knowledge of the existing hostilities: *Roberts v. Hardy*, 3 M. & S. 538; nor will the debt be invalidated if the creditor reside there under a license granted by order in council: *ex. p. Baglehole*, 18 Ves. 525; 1 Rose, 271. An uncertificated bankrupt, *ex. p. Cartwright*, 2 Rose, 230, an insolvent debtor, *Jellis v. Mountford*, 4 B. & A. 256, may, in most cases, be a petitioning creditor. An executor of a bankrupt cannot sue out a commission on a debt due to his testator before his bankruptcy: 1 Atk. 100.

The debt must be a present existing debt, and not one depending on a contingency: *Deacon*, B. L. 90; *ex. p. Page*, 1 G. & J. 100; see *post*. A warrant of attorney has been deemed a *debitum in presenti*, sufficient to support a commission, though given as a security against running acceptances: *Miles v. Rawlyns*, 4 Esp. Rep. 194. The debt should be of a liquidated nature, or capable, from computation, of being liquidated: see 2 Ves. 326; 4 Ves. 168. A mere verdict for damages in an action for breach of promise of marriage or tort, does not constitute, before judgment, a sufficient petitioning creditor's debt: *ex. p. Charles*, 14 East, 197; 16 Ves. 257; *recognized in Walker v. Barnes*, 1 Marsh. 346, and *Scott v. Ambrose*, 3 M. & S. 362. A sum awarded by an arbitrator will support a commission against the person who is awarded to pay it, notwithstanding a bill is filed to set aside the award: *ex. p. Lingood*, 1 Atk. 241. Proof of a surety debt will support a commission against the party liable on it, *Hughes v. Hall, Palin*, 325; but a security for a contingent debt will not be sufficient, though given in the form of a present debt: *ex. p. Page*, 1 G. & J. 100. A penalty due to the crown is a sufficient debt to support a commission, *Cobb v. Symonds*, 5 B. & A. 516; so, also, is an assessment for church and highway rates; and the assessor would be a good petitioning creditor: *Lloyd v. Heathcote*, 2 B. & B. 388.

The debt must be proved to have been contracted, or to have subsisted, while the party was a trader: *Dawe v. Holdsworth*, *Pea. Rep.* 64; *Megott v. Mills*, 1 *Ld. Raym.* 287; 12 *Mod.* 157, s. c. If a simple contract debt is contracted whilst the party is in trade, though he gives the creditor a bond for it after leaving off trade, this will not extinguish the debt, so as to prevent the creditor from suing out a commission on it: *Pea.* 64. But, if a trader, indebted in £100, quit his trade, and afterwards become indebted to the same creditor in £100, more, without saying on what account, the creditor in this case cannot take out a commission upon the old debt: 1 *Ld. Raym.* 287; *Pea. Rep.* 64.

The debt must be proved to have been contracted before, and subsisting at the time of, the act of bankruptcy, *Clarke v. Askew*, *ib.*, 458, n. though, if the existence of the debt be proved before the act of bankruptcy, it will be presumed to be still in existence when the act was committed: *Jackson v. Irwin*, 2 *Camp.* 50. The date of a promissory note is *prima-facie* evidence of the existence of a debt before the act of bankruptcy, *Taylor v. Kinloch*, 1 *Stark.* 175; but this has since been doubted, 2 *ib.* 594, 2 *Stark. Ev.* 161; and, where the petitioning creditor is endorsee of a bill, the endorsement itself must be proved to have been before the act of bankruptcy, no presumption arising from the date of the bill: *Rose v. Rowcroft*, 4 *Camp.* 245. In a case where it was necessary to prove a good petitioning creditor's debt on the 20th May, it was held not sufficient to show that, on the 20th Jan. preceding, a sum of £700 was due from the bankrupt; there being subsequent receipts and payments, and other continuing transactions, between the petitioning creditor and the bankrupt; for, after a period of three months, it was considered impossible to say, under these circumstances, whether £1000 or £5 were really due: *Gressly v. Price*, 2 *C. & P.* 48.

The debt must be complete and perfect before the act of bankruptcy. A verdict in an action for a tort is insufficient, unless a judgment thereon be entered before the act of bankruptcy: *ex. p. Charles*, 14 *East*, 197; 16 *Ves.* 256, *supra*. Where the act of bankruptcy is founded on a lying in prison, and the debt was contracted after the [\*214] arrest, it was holden insufficient: *ex. p. Daggett*, *Whitm. B.* L. 42. It will not be a good debt if the credit given be unexpired at the time of the bankruptcy, *Hoskins v. Duperoy*, 9 *East*, 498, 6 *Esp. Rep.* 55, s. c., *Parslow v. Dearlove*, 4 *East's Rep.* 438, *Sarratt v. Austin*, 4 *Taunt.* 200; but see *Henbest v. Brown*, *Pea. Rep.* 75; unless, in pursuance of 7 *Geo.* 1, c. 51, and 5 *Geo.* 2, c. 30, a written security be given for the payment. Upon a sale of goods at six or nine months, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months; and the debt will not be sufficient to support a commission till the nine months are expired: *Price v. Mixon*, 5 *Taunt.* 338. So, a vendor of goods, to be paid for by a bill at four months, cannot sue out a commission till a bill has been given, or the expiration of the four months, *Cothay v. Murray*, 1 *Camp.* 335; though, where goods were sold to be paid for by a present bill, it will be presumed that a bill was given at the time: *Hoskins v. Duperoy*, 9 *East*, 498; 6 *Esp. Rep.* 55, s. c. A bill of exchange is a debt

from the date of it, and is sufficient to support a commission before the day of payment, *Macarty v. Barrow*, Str. 946, *Bingley v. Maddison*, Co. B. L. 28, *Glaister v. Hewer*, 7 T. R. 408, *Anon.* 2 Wils. 135, *ante*, 213; and, in the hands of an endorsee, it will be a good debt, though the endorsement be made after the act of bankruptcy; but it must be proved to have been made before suing out the commission: *ib.*, *ibid.*; *Rose v. Rowcraft*, 4 Camp. 245. The acceptor of an accommodation-bill, paying the amount after an act of bankruptcy, has not a sufficient petitioning creditor's debt, *ex. p. Holding*, 1 G. & J. 97; nor, where there is an exchange of acceptances between two persons, and, before the maturity of the bill, one of them commits an act of bankruptcy, can the other prove under the commission, till he has paid his own bill: *Sarratt v. Austin*, 4 Taunt. 200. We have seen that a bill of exchange drawn upon an infant, and accepted by him when he came of age, is sufficient to support the commission: *Stevens v. Jackson*, 4 Camp. 164, *ante*, 212. Where a bankrupt drew a bill in favour of A., to whom he was previously indebted, and committed an act of bankruptcy before either the bill was due, or had been presented for acceptance, it was held that the bill was a good petitioning creditor's debt, although it appeared that, subsequent to the commission, the bill had been paid by the acceptors: *ex. p. Douthat*, 3 B. & A. 67, *Eden*, 48.

By 6 Geo. 4, c. 16, s. 19, no commission shall be deemed invalid, by reason of an act of bankruptcy, prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. Before this statute, though the bankrupt himself could not, yet a debtor to the estate might, in an action by the assignees, upon proof of an act of bankruptcy prior to the petitioning creditor's debt, and of a sufficient debt, upon which a commission might be supported, resist the claim, and defeat the commission: *Eden*, 43.

*Mode of Proving Petitioning Creditor's Debt.*] "It is an established rule, that assignees must prove the petitioning creditor's debt by the same evidence which must have been produced in an action against a bankrupt:" *p. Buller, J., Abbott v. Plumbe*, 1 Doug. 216. Therefore, if the debt of the petitioning creditor is on a bill of exchange drawn by the bankrupt, and endorsed by him to the petitioning creditor, besides adducing evidence that it was endorsed before the commission, it will be necessary, in order to prove the debt, to go regularly through the several proofs required in an action by an endorsee against the drawer. Where the debt arose on a bond, an acknowledgment of the bankrupt to a witness, that he owed the debt upon which the commission was sued out, will not supersede the necessity of calling the subscribing witness: *Abbott v. Plumbe*, 1 Doug. 216; see *infra*, as to proof by bankrupt's admissions. Where the petitioning creditor had, upon an application for a loan from a bankrupt delivered to him a check on his banker for £100, which check had got back again to the hands of the petitioning creditor, as if satisfied, but he was unable to give positive proof that the check was *actually paid*, the check of itself was, in this case, held not sufficient evidence of a petitioning creditor's debt: *Bleasby v. Crossley*, 2 C. & P. 213. So, where the debt was an accept-

ance of the bankrupt, and the assignees had had notice to prove the consideration, it was held, that though they were not bound to prove the consideration until impeached, yet that, not having adduced any evidence, and the jury, from circumstances of suspicion attached to the case, having found a verdict for the debt, the court could not disturb that verdict: *Abraham v. George*, 11 *Price*, 423. An award of a separate debt due from the bankrupt to the petitioning creditor, upon a deed of reference by them and other persons, is sufficient evidence of the existence of the debt, on proof of the execution by all the parties: *Antram v. Chase*, 15 *East*, 209. So, an award is evidence of a petitioning creditor's debt, though a bill be filed to set it aside: *ex p. Lingood*, 1 *Atk.* 240; *Marson v. Barber, Gow, C.* 17; *ante*, 213. Where the petitioning creditor is assignee of another bankrupt, and his title, as such, comes in question incidentally, it must be strictly proved, *Doe v. Liston*, 4 *Taunt.* 741; but in the absence of any notice of an intention to dispute the debt, it is sufficiently proved by the production of the proceedings under the commission, unless they contain facts not in themselves sufficient to sustain the bankruptcy: *Skaife v. Howard*, 2 *B. & C.* 560, 4 *D. & R.* 37; and, if the debt be due to the petitioning creditor, as executor, it is not necessary to produce the probate, in order to prove that he was executor, *p. Abbott, C. J., ib.* 562; though, in *Rogers v. James*, 7 *Taunt.* 147, 2 *Marsh*, 425, it was held, an executor might support a commission, though the probate was on an insufficient stamp, if a valid probate be afterwards obtained, for it will have relation back; and, upon the same principle, an executor will be a good petitioning creditor, though there be no probate when the commission is sued out, if there be one before the adjudication of the commissioners: *ex p. Paddy, Buck.* 235; 3 *Mod.* 241.

An acknowledgment or admission of the bankrupt before his bankruptcy, is also evidence of the petitioning creditor's debt, *Watts v. Thorpe*, 1 *Camp.* 376, *Hoare v. Coryton*, 4 *Taunt.* 560; but an acknowledgment or declaration after the bankruptcy is not admissible in evidence: *Smallcombe v. Bruges*, 13 *Price*, 136; *McClell.* 48; *s. c.*; *Sanderson v. Laforest*, 1 *C. & P.* 46. Admissions made after the act of bankruptcy, but before the issuing of the commission, are not sufficient; *Robson v. Kemp*, 4 *Esp. Rep.* 234; *Hoare v. Coryton*, 4 *Taunt.* 560; *sed vide Downton v. Cross*, 1 *Esp. Rep.* 168; *Brett v. Levett*, 13 *East*, 213. The demeanour and conduct of the bankrupt before the commissioners, has been held to be evidence of an implied admission that a balance is due, and a question to be left to a jury; but it is not evidence of an adjudication by the commissioners, or of an award made by consent of the parties, *Jarrett v. Leonard*, 2 *M. & S.* 265, *Eden*, 336; but, an admission by the bankrupt of a debt to the executors of D., is not sufficient to support an averment that the debt was due to plts. as executors of D., without also proving that they assented to act in discharge of the trust: *Rex v. Barnes*, 1 *Stark.* 243. The debt will be sufficiently established, by proving entries of the bankrupt, or an account signed by him before his bankruptcy: *Hoare v. Coryton*, 4 *Taunt.* 560; *Watts v. Thorpe*, 1 *Camp.* 376. Such entries must, however, be

clear and unequivocal, and proved to have been made before the bankruptcy. See further, *post*.

*Proof of TRADING.* As to the persons who shall be deemed traders liable to become bankrupt, it is enacted by 6 G. 4, c. 16, s. 2, "that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and \*persons insuring ships or their freight, or other matters, against perils of the sea; warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses; dyers, printers, bleachers, fullers, calenderers, cattle or sheep-salesmen, and all persons using the trade of merchandise, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies, established by charter or by act of Parliament (13 and 14 Car. 2, c. 24, extended to all companies), shall be deemed, as such, a trader, liable, by virtue of this act, to become a bankrupt."

The trading should be proved, by showing that the party comes within the denominations of *persons* exercising some one of those particular trades specified in the above section, or within the *general description of a trader*. Whether a party was a trader within the meaning of the act, is a question for the decision of the judge upon the several facts found by the jury. The general words in the commission of the bankrupt being a "dealer and chapman," and that he got his living by buying and selling, will admit of evidence of any species of trading, though the commission also describe the particular trade carried on by the bankrupt: *Hall v. Small*, 2 B. & B. 25; *ex. p. Herbert*, 2 Rose, 248; 2 V. & B. 299. The declarations of the bankrupt before the bankruptcy have been admitted in evidence, to prove the trading, *Parker v. Barker*, 1 B. & B. 9; though, indeed the propriety of admitting such evidence has since been questioned: *Bromley v. King*, R. & M. 228.

We shall *first* consider what person is a trader within the statute, under the general description therein, viz. "that all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and selling for hire, or by the workmanship of goods or commodities, shall be deemed traders, liable," &c. *Secondly*, what person is a trader using the particular trades specified in the statute; and, *lastly*, who cannot be made a bankrupt.

To prove a person a trader by *buying and selling* within the above general description in the act, it must be shown that he purchased articles of merchandise for the purpose of selling them again at a profit: 2 B. & C. 475-6; 3 D. & R. 676; *Hankey v. Jones*, Cowp. 750. And, generally, whenever a man buys with the *intention of selling again*,

with a view to profit, he is liable; as, if a man purchase the whole impression of a daily newspaper, to sell again, with a view to profit, and risks the loss of such as remain unsold, it is a sufficient trading, *Gim-mingham v. Laing*, 2 Marsh. 236, 6 Taunt. 532; and "a farmer's servant buying commodities of his master, and selling them, would be a trader;" *p. Gibbs, C. J. ib.* If a man buy horses to sell again, with a view to profit, he is liable to be a bankrupt, *ex. p. Gibbs, 2 Rose*, 38, *Wright v. Bird*, 1 Price, 20; but, if he sell only such as he reared himself, he is not, *ib.* And, if a butcher buy sheep and cattle, and kill and sell them with a view to profit, he is liable to be made a bankrupt, *Dally v. Smith*, 4 Burr. 2148; but, if he kill and sell only such as he reared himself, he is not; *ib.* If a fisherman be in the habit of purchasing fish from others to sell again, with a view to profit, it is a sufficient trading, *Mannay v. Birch*, 3 Camp. 233; but it is not, if he merely sell the fish he has caught; *ib.* Where a person buys coals, for the purpose of again selling them, it is a trading, *Cooke*, 48, 73; but not, if such person merely sell those which are produced from his own mines; or, if such person rents a mine, works it, and sells the ore, it is not a trading, as he does not buy: *Port v. Turton*, 2 Wils. 169.

\*Where it appeared that the party had ordered goods, for the [\*217] purpose, as he alleged, of exporting them abroad, and had promised to give other goods in exchange for them, and it was objected that this was an insufficient proof of trading, as it was proof of buying, but not of selling, *Abbott, C. J.*, observed, "I cannot say, that if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again; at least I must leave it to the jury:" *Milliken v. Brandon*, 1 C. & P. 380. Buying and selling horses, with an avowed intention to take out a license and become a dealer, is sufficient to constitute a trading within the bankrupt laws, however limited the trading, and though no license has been actually taken out: *Wright v. Bird*, 1 Price, 20. And, where A. was a horse-dealer, and livery-stable keeper, and, after his death, his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers, it was held a sufficient trading: *Martin v. Nightingale*, 3 Bing. 421. An executor disposing of his testator's stock is not a trader, though he purchase articles to make it marketable, unless he increase the stock, and continue to sell: *ex. p. Nutt*, 1 Atk. 102, *Eden*, 5. Where a party purchases goods for his own use, that will not make him a trader within this section of the statute, though he afterwards sell such as he may have no occasion for, as he does not seek his living by buying and selling: *Parker v. Wells*, 1 T. R. 34. Where a man makes bricks for his own use, merely from earth on his own land, it is not a trading, though he sell some of them which he has no occasion to use, *ib.*; but if he makes them of earth dug from the waste, for which he afterwards pays the lord, it will: *ex. p. Harrison*, 1 Bro. C. C. 173; *ex. p. Ridge*, 1 Rose, 316. If a man sells the milk of his own cows, and and the cows too, occasionally, when unfit for milking, it is no trading, *Carter v. Dean*, 1 Swanst. 64; nor is it a trading, if a person sell only the cheese which he has made from the milk of his own cows, or the cider which he makes from the fruit of his own trees, *Parker v. Wells*,

1 *T. R.* 34; but, if he buy the cheese or cider to sell again, it will: *ib.*

A person who makes a purchase and sale ancillary to a business which is not itself a trading, does not constitute a sufficient act of trading; therefore, a person who buys an article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader: *Patten v. Browne*, 7 *Taunt.* 409. So, if a man make bricks from his own land, as a mode of enjoying the profits of it, even though he make the bricks entirely for sale, and purchase sand and fuel, &c. for the purpose of making them, he is not a trader within the meaning of the bankrupt laws: *Parker v. Wells*, *Cooke*, 52—63; *Sutton v. Weely*, 7 *East*, 442. And a farmer who occasionally buys hay, corn, horses, &c., with a view to sell again for profit, the buying and selling being incident to the occupation of the farm, does not thereby become a trader, *Stewart v. Ball*, 2 *N. R.* 78; but, where a farmer bought horses unfit for farming, and resold them, and avowed his intention to take out a license and become a horse-dealer, these facts were held to be evidence of trading: *Wright v. Bird*, 1 *Price*, 20; *Martin v. Nightingale*, 3 *Bing.* 421.

*The Quantum of the Dealing, or the Smallness of the Profit*, is immaterial, if it be proved that it was the party's intention to deal generally, in which case evidence of one act of buying and selling is sufficient to constitute a trader within the bankrupt laws: *Newland v. Bell*, *Holt*, 221, *p. Gibbs*, *C. J.* And the purchase of one lot of timber, with intent to sell again, will make a man a trader, even if the timber be standing at the time of the purchase: *Holroyd v. Gwynne*, 2 *Taunt.* 176; *Patman v. Vaughan*, 1 *T. R.* 572; *Gale v. Halfknight*, 3 *Stark.* 56; *Eden*, 3. But, if a person is not in a line of life to subject him to the bankrupt laws, he will not be deemed a trader by occasional [\*218] acts; as, where a schoolmaster \*sells books to his own scholars, only, *Valentine v. Vaughan*, *Pea. Rep.* 76; or where a contractor for victualling the fleet, sells off the surplusage, *Gibbins v. Thompson*, 1 *Vent.* 270; so a colonel of a fencible regiment occasionally selling horses at an auction; or a person who keeps hounds, buying dead horses, and selling their skins and bones, *Summersett v. Jarvis*, 3 *B. & B.* 2, 6 *Moore*, 56; or a person, finding that he has bought more of an article than he wants, selling the residue, such parties will not be traders: *Bolton v. Sowerby*, 11 *East*, 276. And, where a cow-keeper, who lived by selling milk, occasionally sold such cows as were unfit for use, such sale was held not to be a trading: *Carter v. Dean*, 1 *Swanst.* 64. It will, however, be a question, in such cases, for the jury, whether it affords evidence of an intention to deal generally: *Martin v. Nightingale*, 3 *Bing.* 421; *Eden*, 4. And a declaration by the party of the object of his buying, *Gale v. Halfknight*, 3 *Stark.* 56; or his representing himself as a dealer, and buying goods, and offering them in exchange for others, *Milliken v. Brandon*, 1 *C. & P.* 380, will be received as evidence of his intention in this respect.

The *Legality* or *Illegality* of the Buying and Selling, &c., makes no difference. Smuggling may constitute a trading, and the person carrying it on may be a trader, within 21 *Jac.* 1, c. 15, s. 2, as being a person who seeks his trade or living by buying and selling: *Cobb v. Symonds, B. & A.* 516; 1 *D. & R.* 111. But, when there is distinct proof that a person bought goods in conjunction with others, to carry on a system of fraud, by making away with the goods, and never selling any of them, is no trading: *Milliken v. Brandon*, 1 *C. & P.* 380. A trader may become a bankrupt, although he has not taken out a license, to render his trading legal: *Sanderson v. Bowles*, 4 *Burr.* 2066.

The Buying and Selling should be of "*Goods or Commodities*," within the meaning of this section of the act. Buying and selling land, or any interest in land, is not trading, *Port v. Turton*, 2 *Wils.* 169. Nor is buying and selling government stock, or other public stocks or securities: *Colt v. Netterville*, 2 *P. Wil.* 308.

By the above section, the *Buying and Letting for Hire* of "goods and commodities," or buying them with intent to let them for hire, is sufficient to constitute a trading, and render a party liable to the bankrupt laws. It would now probably be held, that a person having a share in a ship, which is let out on charter, may be considered as a trader, *ex. p. Bowes*, 4 *Ves. Eden*, 8. This provision will include a large class of persons, such as job-masters, livery-stablekeepers, hackney-men, furniture-brokers, &c., *Deacon*, 27. In this respect, the repealed acts differ from the present, and it was formerly held, that buying horses for the purpose of letting them out to hire, was not deemed a trading; as there was no selling, nor intent to sell: *Martin v. Nightingale*, 3 *Bing.* 421; 1 *Vent.* 29.

*Workmanship of "Goods and Commodities."*] Purchasing the raw materials of trade, and selling them again under another form, or improved by the labour of manufacture, as in the case of bakers, who buy the flour, of which they make bread, 3 *Mod.* 330; butchers, who purchase cattle, and kill them for the purpose of sale, *Dally v. Smith*, 4 *Burr.* 2148; shoemakers, who purchase the leather, of which they make shoes, *Crampe v. Barne*, *Cro. C.* 31; smiths, *Cooke*, 48; tanners, 3 *Mod.* 330; tailors, &c., *Parker v. Wells*, *Cooke*, 56; have always been held to be traders, subject to the bankrupt law. The above section of the present act, however, "extends the description still further, so as to comprehend those manufacturers, on an extended scale, who are not excluded from its operation by the subsequent proviso as to "common labourers or workmen for hire," *Eden*, 8; and the words are of so extensive a \*meaning, "as not to imply a buying to be neces- [\*219] sary, but, on the contrary, are put in contradistinction to the words *buying and selling* in a preceding part of the clause; and it would, therefore, seem that all persons who manufacture goods for sale, with a view to profit, are within it, whether they purchase the raw materials, or have it from their own land, &c., without purchase." *Arch. B. L.* 29; *Deacon* 27. But it is necessary, in this case, as in that of



buying and selling, that it should be the general practice of the party, or that there should have been a commencement of it coupled with an intention to continue it, as an occasional act would be insufficient: *ante*, 217.

*Secondly, what Person is a Trader using the particular Trade specified in the act. Bankers.]* A person may be deemed a banker if he act as such, and it is not necessary that he keep an open shop; and one who receives money as a banker, although his books are kept in a manner different from that in which bankers' books usually are, and although on receiving any large sum, he pay it to his own established banker, upon whom he gives drafts for the payment of large bills upon him, he only keeping cash to answer small drafts, is a banker within the statute: *ex. p. Wilson*, 1 *Atk.* 218. But an army or navy agent is not deemed a banker: *Eden*, 6, 1 *Mont.* 12.

*Brokers.]* This term includes not only brokers concerned in the purchase and sale of merchandise, but also stock-brokers, *Cott v. Nettervil*, 2 *P. Wil.* 308, *Cullen*, 68; pawnbrokers, *Rawlinson v. Pearson*, 5 *B. & A.* 124. See *infra*, as to insurance-brokers.

*Scriveners.]* "In order to make a man a money-scrivener, he must carry on the business of being trusted with other people's moneys, to lay out for them, as occasion offers: *p. Gibbs, C. J., Ralph v. Malkin*, 3 *Camp.* 534; *Hamson v. Harrison*, 2 *Esp. Rep.* 555. Where money is usually lodged in the hands of an attorney by his clients and others, for the purpose of being invested in securities, and upon his so investing the money, he charged, not only for the conveyances, but also a certain bonus or compensation for himself, and he were a conveyancer, as well as an attorney, then, it seems, he would be deemed a scrivener within the above statute: *Hutchinson v. Gascoigne*, 1 *Holt*, 507. But a man who had money of other persons in his possession, and who discounted bills with it for his own emolument only, was holden not to be a scrivener: *Hamson v. Harrison*, 2 *Esp. Rep.* 555. So it has been holden, that an attorney purchasing and selling estates, negotiating loans, &c., for his clients, in the common course of his profession, and making only the regular professional charges for the conveyance, &c. was not a scrivener within the statute of *Jac.* 1, above-mentioned: *ex. p. Malkin*, 1 *Rose*, 406; 2 *East*, 27, 28; *re Lewis*, 2 *Rose*, 59; *Hurd v. Brydges*, 1 *Holt*, 554.

*Persons Insuring Ships or Freight, or other Matters, against Perils of the Sea.]* Underwriters, the description of persons here alluded to, could not, previously to the new act, be made bankrupts in that character: *ex. p. Bell*, 15 *Ves.* 355. Insurance-brokers are not within this section of the act: 4 *Mad.* 256.

*Warehousemen, Wharfingers, Packers*, are named in the act.

*Builders.]* These were not considered traders within the former

bankrupt laws: *Blake v. Lawrence*, 4 *Esp. Rep.* 147; *Williams v. Stevens*, 2 *Camp.* 300.

*Carpenters, Shipwrights.*] This seems to mean such a person as purchasers \*timber and other materials, which he [\*220] works up as a carpenter, and not a person who is merely a labourer or workman for hire: *Kirney v. Smith*, 1 *Ld. Raym.* 741.

*Victuallers, Keepers of Inns, Taverns, Hotels, or Coffee-Houses.*] There was formerly a distinction, that neither victuallers nor innkeepers could be made bankrupts, so long as they confined themselves to supplying their guests in the house, unless they showed an intention to deal out of doors: *Crisp v. Penit*, *Cro. C.* 549; *Eden*, 8.

*Dyers, Printers, Bleachers, Fullers, Calenderers, Cattle and Sheep Salesmen*, are named in the act. Any doubt which might formerly have been entertained as to their liability to be bankrupts, is now removed: *Mills v. Hughes, Willis*, 588.

Persons acting as *agents* or *factors* for others, seeking their living by buying and selling, are within the act.

*Persons who may or may not be made Bankrupts.*] Sec. 135 of the act, extends "to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby."

*Aliens and Denizens.*] Under 21 *J. 1, c. 10, s. 15*, which is in substance the same as the above section, it has been held that aliens or subjects trading to and from this country, buying goods here, and sending them abroad for sale, or buying them abroad, and sending them here for sale, may, if they come here and commit an act of bankruptcy, be made bankrupts, though they may have formerly been residing in Scotland, *Alexander v. Vaughan*, *Cowp.* 398; *Dodsworth v. Anderson*, *T. Raym.* 375; in the British Colonies, *ex. p. Smith*, cited by *Ld. Mansfield*, *Cowp.* 402; in the Isle of Man, *Allen v. Cannon*, 4 *B. & A.* 418; or in any foreign country, *Bird v. Sedgwick*, 1 *Salk.* 110.

*Women.*] A married woman can only be made bankrupt in those cases, which, according to the principle laid down in *Marshall v. Rutton*, 8 *T. R.* 546, she can be sued, and taken in execution for her debts, or where she cannot plead her coverture; *ante*, 6: viz., where the husband has abjured the realm, become an exile, been transported, &c., *ib.*, *post*, "*Husband and Wife*." Therefore, where a *feme sole*, being a trader, marries, a commission issued after the marriage cannot be supported, the creditors, upon the wife's marriage, becoming the creditors of the husband, *ex. p. Mear*, 2 *Bro. C. C.*; *Preston v. Green, Cooke*, 40. A *feme coverte*, who is a *sole* trader according to the custom of London, may be a bankrupt: *Lavie v. Phillips*, 3 *Burr.* 1776; 1 *W. Bl. R.* 570; *ex. p. Carrington*, 1 *Atk.* 206.

*Infants* are not liable to be made bankrupts, except in cases where they have traded, and held themselves out as adults; *ex. p. Watson*, 16 *Ves.* 265; *Exp. Keck, cited ib.*, *Cooke*, 40; *ex. p. Adam*, 1 *V. & B.* 494; but, unless this is the case, a commission will be superseded, though he have a partner of mature age, *ex. p. Banvis*, 6 *Ves.* 601.

*Lunatics.*] It has been laid down that lunacy is no defence against a commission of bankruptcy; *Anon.* 13 *Ves.* 590; *Eden*, 2. It has been once held, however, that he was incapable of committing an act of bankruptcy while under the influence of that malady: *ex. p. Priddey*, 1 *Co. B. L.* 87.

*Attainted Person.*] It would seem that he is subject to a commission of bankruptcy: *Ramsay v. McDonald, Foster*, 61; *ex. p. Bullock*, 14 *Ves.* 464.

\**Peers and Members of Parliament* may be made bankrupts, *ex. p. Meymott*, 1 *Atk.* 201; so may ambassadors' servants, by 7 *Anne*, c. 12.

*Public Officers*, as excisemen, may be bankrupts, if they are traders: *Highmore v. Molloy*, 1 *Atk.* 206.

*Clergymen*, though prohibited by stat. from entering into trade, may be made bankrupts, *Hankey v. Jones, Cowp.* 745; a commission, however, against a clergyman, founded on a debt arising out of a contract made after he has become such in the course of trade, cannot be supported: *Deacon*, 94.

*When a Person ceases to be subject to the Bankrupt Law, by leaving off his Trade.*] If a person leaves off his trade for some other employment, or has ceased to buy, but is selling off his stock, he may still be liable to be made a bankrupt, unless there be no intention on his part to exercise or resume it, which is a question for the jury: *ex. p. Paterson*, 1 *Rose*, 402. A pawnbroker who had formerly taken in goods upon pledge, but had ceased to do so, but still continued to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to be made a bankrupt: *Rawlinson v. Pearson*, 5 *B. & A.* 124. And, if a trader ceases to manufacture, but still continues to solicit orders, and to execute them, and he holds himself out to the world as capable of executing them, he is an object of the bankrupt laws: *Wharam v. Routledge*, 5 *Esp. Rep.* 235. Where trade has been carried on by the party with another in partnership, though the partnership had been dissolved some years before, and no act of trading had occurred for two or three years before the time when the petitioning creditor's debt accrued, but the concerns remained unsettled, and part of the stock in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued: *Backhouse v. Tarleton, cor. Ld. Ellenb.* 2 *Stark. Ev.* 143; *ex. p. Cundy*, 2 *Rose*, 357; *Doe v. Lawrence*, 2 *C. & P.* 134. And, though a trader retires altogether from business,

yet, if he owes debts contracted in the course of his trade, and afterwards commit an act of bankruptcy, he is still liable to be made a bankrupt: *ex. p. Bamford*, 15 Ves. 449.

**ACT OF BANKRUPTCY.]** It must be proved the trader committed an act of bankruptcy sufficient to support the commission. The 3d, 4th, 5th, 6th, 7th, and 8th sections of the 6 Geo. 4, c. 16, point out the modes in which such act of bankruptcy may be committed, and to which may be added the 13th section of 7 Geo. 4, c. 57 (the Insolvent Act). The 9th, 10th, and 11th sections of the former act, relate to acts of bankruptcy committed by traders, members of Parliament. The 3d section of the 6 Geo. 4, c. 16, enacts, that if any such trader (*as already mentioned, ante*, 215 to 220), departing the realm, or being out of this realm and remaining abroad, or departing from his dwelling-house, or otherwise absenting himself, or beginning to keep his house, or suffering himself to be arrested for any debt not due, or yielding himself to prison, or suffering himself to be outlawed, or procuring himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or making, or causing to be made, either within the realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make, or cause to be made, any fraudulent surrender of any of his copy-hold lands or tenements, or making, or causing to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, *with intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy.

But section 4 of the same act enacts, that such trader, executing any conveyance or assignment by deed, to a trustee or trustees, of all his estate <sup>\*</sup>and effects, for the benefit of all the creditors of [<sup>\*222</sup>] such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader, within six calendar months, from the execution thereof, by such trader, provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof, by the said trader, and that the execution by such trader, and every such trustee, be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof, by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers, and in case such trader does not reside within forty miles of London, then, in the London Gazette, and also in one London daily newspaper, and one provincial newspaper, published near to such trader's residence: and such notice shall contain the date and execution of such deed, and the name and place of abode, respectively, of every such trustee, and of such attorney or solicitor.

Section 5 enacts, that any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, and thereupon lying in prison for twenty-one days, or escaping out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, from the time of such arrest, commitment or detention.

And section 6 enacts, that any such trader, filing in the office of the Lord Chancellor's secretary of bankrupts a declaration in writing, signed by himself, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum, that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement, inserted as aforesaid, be an act of bankruptcy, committed by such trader, at the time when such declaration was filed; but no commission shall enter thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed. By the same section, the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed.

By the 8th section, after a docket struck, such trader paying money, or giving, or delivering any satisfaction or security, for his debt, or any part thereof, to the person striking the docket, whereby such person may receive more in the pound, in respect to his debt, than the other creditors, shall be deemed an act of bankruptcy.

By the 13th section of 7 G. 4, c. 57 (the Insolvent Act), the filing a petition to take the benefit of the Insolvent Act shall be deemed an act of bankruptcy, from the time of filing the petition, provided the debtor is in actual custody at the time of filing the petition, and that he is declared before the time advertised in the Gazette, and appointed by the Insolvent Court for hearing the matters of the petition, or within two calendar months from the filing of the same. The enactment also provides, that a commission, issuing on this act of bankruptcy, shall, after such adjudication, within the above-mentioned period, but not before, have the effect of avoiding any conveyance and assignment of the estate and effects of such person under the Insolvent Act.

By the 9th section, it is enacted, that a *trader, having privilege of Parliament*, committing any of the acts of bankruptcy before enumerated, a commission may issue against him, and be proceeded against in like manner as against other bankrupts, save, indeed, that he cannot be arrested or imprisoned during the time of his privilege, except in cases of felony, made so by the statute. The 10th section also provides, that if any creditor of such trader, to the amount requisite to support a commission, shall file an affidavit in any court of record at Westminster, that the debt is justly due to him, and that the debtor is such a trader, and shall sue out of the same court a summons, or an original bill and summons, then, if such trader shall not, within one calendar month after personal service of such summons, either pay, secure, or compound for the debt, to the satisfaction of the creditor, or enter into a bond in such sum, and with two such sufficient sureties as any of the judges of the court out of which the summons is issued shall approve of, conditioned to pay such sum as shall be recovered in the action, together with the costs, and also a proper appearance to be entered in such action, every such trader shall, in that case,

be deemed to have committed an act of bankruptcy, from the time of the service of such summons, and any creditor may sue out a commission against him, and proceed therein, as against other bankrupts. The 11th section also provides, that such trader, having privilege of Parliament, disobeying the order of any court of equity, or, in bankruptcy or lunacy, for payment of money after service, and peremptory-day fixed, shall be deemed to have committed an act of bankruptcy.

Having enumerated the legislative enactments relative to what constitutes an act of bankruptcy, it should be observed, before entering into a detail of the evidence necessary to constitute such act, that the third section of the 6th G. 4, renders the *intent* of the trader a necessary ingredient in acts of bankruptcy therein mentioned; whereas the other sections do not render such intent at all material. As a further preliminary, it should also be observed, that an act of bankruptcy, committed at any time previous to the sealing of the commission, though after docket struck, 14 *Ves.* 86, 1 *V. & B.* 51, or on date of commission, 1 *Stark.* 507, will suffice. But the act must not be one of several years' standing: 4 *Ves.* 175; 1 *Lev.* 13. An act of bankruptcy committed after the party has retired from trade, provided it be during the existence of a sufficient petitioning creditor's debt, contracted whilst in trade, is sufficient: *ex. p. Bamford*, 15 *Ves.* 449, 495; 16 *Ves.* 145. The act of bankruptcy must be committed in England or Wales, unless otherwise provided against by the act, as remaining out of the realm, &c.: *Cowp.* 402. In the case of a partnership, and a joint commission issued against the firm, each of the partners must have committed an act of bankruptcy, in order to support the commission: 2 *M. & S.* 536; 19 *Ves.* 543. The act of bankruptcy must not be concerted: see *B. N. P.* 39; 2 *T. R.* 594; *Peake Rep.* 27. A concerted act, however, is sufficient, as against party's creditors privy to it: 16 *Ves.* 145; *B. N. P.* 39. It is no objection to an act of bankruptcy, that the trader has been advised to have recourse to it by a friend: *Roberts v. Teasdale*, *Pea. Rep.* 27. But, in a case where the attorney for the bankrupt was also attorney for the petitioning creditor, this act of bankruptcy was considered fraudulent, though the denial was without the knowledge of the petitioning creditor: *Rosser v. Smith, Holt*, 442. The filing a declaration of insolvency at the Bankrupt Office, is not invalid by its being concerted between the bankrupt and any other person: 6 G. 4, c. 16, s. 7. When an act of bankruptcy has been once committed, it remains always an act of bankruptcy, and its effect cannot be purged by subsequent acts explaining it, or otherwise; *B. N. P.* 39; 2 *T. R.* 59; 3 *Esp. Rep.* 245; 1 *Taunt.* 479; *Pulling v. Tucker*, 4 B. & A. 382. But, if the alleged act of bankruptcy be equivocal, circumstances may be given in evidence to prove it was not committed with an intent to defeat or delay creditors: *ex. p. Hall*, 1 *Atk.* 201. We shall hereafter see the assignees, &c., are not tied down to the proof of any one specific act of bankruptcy, *post*.

We shall now consider in detail, and in the order of the above different enactments, the various acts which will constitute an act of bankruptcy.

*Departing the Realm.*] The word "realm" seems to mean nothing \*more than the extent of the jurisdiction of the courts [\*224] in this country, for leaving this country to go to Ireland is a departing the realm: *Williams v. Nunn*, 1 *Taunt.* 270; *Windham v. Paterson*, 1 *Stark.* 144. And, if a trader residing in Ireland, or elsewhere, come to this country upon some temporary business, and again quit it to avoid being arrested by a creditor, it is departing of the realm, within the meaning of the statute: *ib.*; *Holroyd v. Gwynne*, 2 *Taunt.* 176; and see *Warner v. Barber, Holt*, 175. The departure must, however, be with *the intent* to delay his creditors in the recovery of their debts: *Windham v. Paterson*, 4 *Camp.* 286; 1 *Stark.* 146. However, where a trader departs the realm, slight evidence will in general be sufficient to manifest such an intention, as if it appears he was in embarrassed circumstances, that would be *prima-facie* evidence of such intention, 2 *V. & B.* 177; 1 *Rose*, 387; if it appears that the creditors were in fact delayed, that will be *prima-facie* evidence, as "a person may be supposed to foresee, and to intend, whatever is the necessary consequence of his own acts:" *Ramsbottom v. Lewis*, 1 *Camp.* 280; *Holroyd v. Whitehead*, 3 *Camp.* 530; *Warner v. Barber, Holt*, 175. Where a trader departs the realm to avoid a criminal prosecution, *Woodier's Case*, *B. N. B.* 29, or in defiance of such rules of morality, as where a married man ran away with a young lady, so as to manifest a neglect of the interest of the creditors, he will thereby be deemed to have committed an act of bankruptcy: *Raikes v. Porcan*, 1 *Co. B. L.* 73; *Vernon v. Hankey, ib.*, 98. An intention to delay the creditors would be rebutted, if it appeared that the trader had evinced a regard, previous to his departure, to the interest of his creditors, or if he has *advertised* his going, or if he leaves a partner behind: *Ramsbottom v. Lewis*, 1 *Camp.* 280. The intent with which the party departs the realm, is, however, a question for the jury: *Warner v. Barber, Holt*, 175.

*Being out of this Realm, and remaining Abroad.*] The intention of the party in delaying his creditors, must be proved in the same manner as already noticed, *supra*. A trader protracting his residence abroad, for an unreasonable length of time, without assigning a sufficient cause for his absence, or leaving funds, or making other arrangements here for the payment of his debts, is, *prima-facie*, sufficient evidence of the intention: *Deacon*, 47.

*Departing from his Dwelling-House.*] Departing from the party's counting-house or place of business, although he have a dwelling-house elsewhere, is an act of bankruptcy: *Jardine v. Da Costa*, 1 *N. R.* 234. And a trader who has no settled home, but takes up a temporary abode at a public house, in the place in which his business carries him, commits an act of bankruptcy, by departing from such public house, with intent to delay his creditors: *Holroyd v. Gwynne*, 2 *Taunt.* 176. The departure must be voluntary, and not compulsory; for, where a man is arrested, and thereby obliged to leave his house, such a departure is not an act of bankruptcy: *Phillips v. Sheriff of Essex*, 1 *Co. B. L.* 85. The distance that a person departs to, after leaving his dwelling-house, or the length of time that he is absent from it, are perfectly immaterial, if the object be to delay his creditors: where a trader went to his neigh-

bour's house, and told him he expected every moment to be arrested, upon which he concealed himself, and desired his neighbour to watch, but returned home immediately after the officer was gone, such temporary absence was held to be an act of bankruptcy: *Chenoweth v. Haley*, 1 *M. & S.* 676; *Bayly v. Schofield*, *ib.* 338. And, if the party go to a distant place, among strangers, it may be an act of bankruptcy, though he is visible there; and going only to the next house may also be the same, if he is not visible: *p. Buller, J.*, cited *Aldridge v. Ireland*, cited 1 *Taunt.* 273. Where a man rode out of town in order to avoid being arrested, and returned in the evening, and \*the next morning sent for the bailiff, and told him [\*225] he went out in order to get the term of the plt., this was held to be such a departing from the dwelling-house as was sufficient to constitute an act of bankruptcy: *Maylin v. Eylve*, 2 *Str.* 809. And, if a trader, on being applied to for payment by a creditor, leaves his house under pretence of getting money, but goes to a billiard-table and remains there the whole evening, this has also been held an act of bankruptcy: *Bigg v. Shooner*, 2 *Esp. Rep.* 651.

The departure must be with the *intention* to avoid his creditors; and it is, in such case, immaterial whether any creditor was delayed or not in his absence, *Robertson v. Liddell*, 9 *East*, 487, *Hammond v. Hicks*, 5 *Esp. Rep.* 1 *ib.* 334, *Williams v. Man*, 1 *Taunt.* 270; or whether or not he departed from a groundless apprehension of being arrested: *ex. p. Bamford*, 15 *Ves.* 449. The intention may, as in other cases, be presumed as the necessary consequence of the party's act: *ante*, 224. When the departure is evidently for a laudable purpose, although creditors be delayed, it is not an act of bankruptcy; as, leaving home to recover a debt, *Fowler v. Padget*, 7 *T. R.* 509; or to arrange with a creditor, leaving word where he is gone, *Aldridge v. Ireland*, cited 1 *Taunt.* 273, *sed vide Deffle v. Desanges*, 8 *Taunt.* 671, 3 *Moo.* 7; or for any other lawful purpose, 9 *East*, 492, 4 *Taunt.* 603; or for avoiding altercation, *ib.*

*Otherwise Absenting Himself.*] These words are not confined to an absenting from a dwelling-house; for, if a trader absent himself from any place, with intent to delay his creditors, it is an act of bankruptcy: *Hallen v. Homer*, 1 *C. & P.* 108; *Curteis v. Willis*, *ib.* 211. Hence, where, a trader, who carried on business at a counting-house, went away, taking his books with him, *Fudine v. Da Cossen*, 1 *N. R.* 234; or where a trader went into the back shop in a neighbour's house, to avoid being seen by an officer, who, he said, had a writ against him, *Chenoweth v. Hay*, 1 *M. & S.* 676; or if a man, being arrested for debt, escapes to the house of another person, and is there denied to the officer, *Bayley v. Schofield*, *ib.* 338; and a trader secretly withdrawing himself after he has been arrested, *Phillips v. Peak, Green*, *B. L.* 52. If a trader has no dwelling-house or counting-house, his withdrawing himself from the usual place where he transacts his business, or is to be found, is an act of bankruptcy; therefore, if a man takes up a temporary abode at a public-house, and leaves it for fear of his creditors, *Holroyd v. Gwynne*, 2 *Taunt.* 176; so, if a man having no known place of abode, but who is in the habit of attending the Royal Exchange, to transact his business there, leaves it on the approach of his creditors, desiring a friend to say



he is not there, or breaks an appointment he has made with a creditor to meet him there, to pay his debt, if it be done with the intention to delay his creditors, *Ghimingham v. Laing*, 2 Marsh, 236, 6 Taunt. 532; or where the proprietor of a theatre retired behind the scenes to avoid a sheriff's officer, desiring to be denied to him, *ib.* Where a party makes an appointment to meet a creditor at a particular place, and fails to do so, it will not constitute an act of bankruptcy, unless it afford strong evidence of an intention to delay his creditors: *Tucker v. Jones*, 2 Bing. 2; *Schooling v. Green*, 3 Stark. 149. A trader leaving his shop, and desiring his servant to make some excuse for his absence, in the event of a creditor's calling, is sufficient evidence to lay before a jury of an act of bankruptcy: *Deffe v. Desanges*, 8 Taunt. 671; 3 Moo. 7, 4. Where a trader of the creditor's attorney goes to the office of the latter, to avoid being arrested in the street, it has been held, that, by so doing, he did not commit an act of bankruptcy: *Mills v. Elton*, 3 Price, 142.

*Beginning to keep his house.*] If a trader seclude himself up in his house, to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to [\*226] keep house: \**p. Ld. Ellenb., Dudley v. Vaughan*, 1 Camp. 271. Proof of a denial is not in all cases requisite to substantiate an act of bankruptcy, by the trader beginning to keep his house, though formerly it was indispensable, *Garra v. Moule*, 5 T. R. 575; as, where a trader removed from his country-house to his parlour, to avoid personal application to him, *Dudley v. Vaughan*, 1 Camp. 271; or where he retired from the place where he usually sat into a back room, and drew the curtains, *King v. Bebb*, 1 M. & S. 354; or where he confined himself for nearly a month to his bed-room, except Sundays, *Bayley v. Schofield*, *ib.*, 338; or where he ordered his doors to be kept shut, and not opened till it was ascertained from the window who the person was who sought admittance, *Harvey v. Ramsbottom*, 1 B. & C. 55, 2 D. & R. 142; but shutting up a banking-house is not evidence of a keeping-house on the part of a partner, whose residence is elsewhere: *ex. p. Mavor*, 19 Ves. 543. A trader's secreting himself in the house of a friend, where persons have been in the habit of calling on him, will constitute a sufficient act of bankruptcy: *Curteis v. Willis*, R. & M. 58; 4 D. & R. 224, s. c.

A general order to be denied is alone sufficient evidence of a beginning to keep house: *Lloyd v. Heathcoat*, 2 B. & B. 388; 5 Moo. 129. The order to deny must be proved to have been given by the trader himself, *Dudley v. Vaughan*, 1 Camp. 271, *ex. p. Foster*, 17 Ves. 416; and an order given by a trader to his wife to deny him, is sufficient evidence of keeping house: *Lloyd v. Heathcoat*, 2 B. & B. 388; *ex. p. Hall*, 1 Atk. 201. If a trader give a general order to be denied, and is denied to a particular creditor, it is evidence of keeping house, though the party calling is not the objectionable person, and such fact is made known to him: *Muclov v. May*, 1 Taunt. 479; *Colkett v. Freeman*, 2 T. R. 59. It will still be evidence of a keeping house, though the trader be seen by the creditor at the time of denial: *ex. p. Bamford*, 15 Ves. 451. A denial on a Sunday has been deemed not to be evidence of a keeping house, even though the trader appointed the creditor to come on that day

for the purpose of settling accounts: *ex. p. Preston*, 2 *V. & B.* 312. A denial to a person merely demanding payment of a debt, but not demanding an interview with the trader himself, is not evidence of a beginning to keep house, *Dudley v. Vaughan*, 1 *Camp.* 271; nor is the denial to a person calling to obtain the trader's execution of a bail-bond, according to a promise made by him when arrested: *Schooling v. Lee*, 3 *Stark.* 149; but see *Deacon*, 56, *n.* But a denial made to a creditor, under an idea that his object in calling was to demand payment of a debt, is evidence of keeping house, though, in fact, that was not his object: *ex. p. White*, 3 *V. & B.* 128; *ex. p. Harris*, 2 *Rose*, 67, *s. c.* It matters not whether the denial be to a creditor or not: *Eden*, 23. A denial to several persons, whom the trader's servant supposed to be creditors, is evidence for a jury as to the trader's intention: *Jameson v. Eamer*, 1 *Esp. Rep.* 381. So, a denial to a collector of taxes is evidence of a beginning to keep house, *Sanderson v. Laforest*, 1 *C. & P.* 46, 336; or where the party called in consequence of the dishonour of a bill, and was denied, *Bleasby v. Crossley*, 2 *C. & P.* 213; or a denial to the collector of the church and highway rates, *Lloyd v. Heathcote*, 2 *B. & B.* 388, 5 *Moo.* 129; for it is the intention of the party in being denied, and not the object of the person calling, which will be considered to constitute a keeping house, *Deacon*, 55; the act of bankruptcy depending on the intent to delay, and not on the intent being productive of the effect: *p. Bayley, J., Chenoweth v. Hay*, 1 *M. & S.* 679. A banker stopping payment, or refusing to pay money when called on for that purpose, does not thereby commit an act of bankruptcy, if he keeps his shop open, and does not conceal himself: 7 *Mod.* 139.

The period during which the trader keeps his house is not material: *Palm*. 325. A denial once having been made, is evidence of a beginning to keep house, though the creditor be afterwards admitted in consequence of his importunity, *Wood v. Thwaites*, 3 *Esp. Rep.* [\*227] 245; and though the trader deny himself, and afterwards appear in public, and pay the debt: *Colkett v. Freeman*, 2 *T. R.* 59. Where a general order to be denied is given, the fact of the trader's being subsequently denied on account of illness will not affect the act of bankruptcy, as the intention will be referable to his previous orders: *Lazarus v. Watthman*, 5 *Moo.* 868. Where a trader was in the rules of the K. B., and had come to his house out of the rules, and was there denied, it was held to be evidence of keeping his house, *Hughes v. Gilman*, 2 *C. & P.* 32; and a denial at the trader's lodgings, not his usual place of residence, is also evidence: *Park v. Prosser*, 1 *C. & P.* 176.

The intention in a trader's being denied may be explained away, and the presumption of its having been done with the supposed intent to delay creditors may be repelled; as, by his being denied whilst at dinner, or engaged in business, *Shew v. Thompson, Holt*, 159, *Lloyd v. Heathcote*, 2 *B. & B.* 392; or at an unseasonable hour; and, on many other occasions, which may easily be imagined, he may refuse to see his creditors, without meaning to delay them, and therefore without committing an act of bankruptcy, although they should for a time be delayed; *p. La. Ellenb., Smith v. Currie*, 3 *Camp.* 350. So, as we have just seen, a denial on a Sunday is not evidence of an act of bankruptcy: *ex. p. Hall*,

1 *Atk.* 201; *Stafford v. Clarke*, 1 C. & P. 27; *ex. p. Preston*, 2 V. & B. 312.

*Suffering himself to be Arrested for any Debt not Due.*] The object of this enactment, as observed by Mr. Deacon, is, no doubt, to provide against a voluntary submission to an arrest for a fictitious debt; but the suffering himself to be arrested upon a bill of exchange *not due*, or, indeed, for any debt *solvendum in futuro* (if the *intention* is to defeat or delay a creditor), would, it is apprehended, come within the meaning of the statute: *Deacon*, 61.

*Yielding himself to Prison.*] Where a trader, capable of paying, from fraudulent motives, voluntarily goes to prison, it is a sufficient act of bankruptcy: *ex. p. Barton*, 7 Vin. 61; *Rex v. Page*, 7 Price, 616. It must be done, however, with the intent to delay his creditors: *ante*, 224. A *bonâ fide* surrender in discharge of bail will not constitute an act of bankruptcy within the meaning of this clause.

*Suffering himself to be outlawed.*] To render outlawry an act of bankruptcy, it must have been suffered with an intent to defraud creditors, *Radfor v. Bludworth*, 1 Lev. 13: and the outlawry must be in England or Wales. An outlawry in a county-palatine will be sufficient, *Stone*, 124, Co. Dig. Bankrupt; an outlawry in Ireland will not, *ib.*, *Deacon*, 62.

*Procuring himself to be Arrested, or his Goods, Moneys, or Chattels, to be Attached, Sequestered, or taken in Execution.*] Any arrest made by a man's own procurement will come under this provision; it being immaterial whether the arrest is for a real or a fictitious debt, 7 Vin. Ab. 61; and, if the party procure himself to be outlawed, it will be equally an act of bankruptcy, whether the debt be a just debt or not: *ex. p. Barton*, *ib.* The last words of this provision were not included in 1 Jac. 1, c. 15, s. 2; under which it had been held, that a fraudulent execution, though void as against creditors, was not a procuring of goods to be attached, which meant only a proceeding by foreign attachment: *Clarey v. Hayley*, Cowp. 427; *Cooke*, 118. An attachment out of any court for mere default or *laches* would not be an attachment within the meaning of the statute: for such an attachment could not be considered as done by debt's own procurement: see *Com. Dig. Bankrupt*, C. 2.; *Deacon*, 63.

[\*228] Where a trader, hearing that a writ of *fi. fa.* is issued against \*him, clandestinely conveyed his goods out of his house, and concealed them privately, in order to prevent them from being levied in execution, this, it was held, though a palpable fraud, was not an act of bankruptcy: *Cole v. Davies*, 1 Ld. Raym. 724. The arrest, attachment, sequestration, or execution, must be proved to have been procured by the bankrupt, with intent to defeat or delay his creditors.

*Fraudulent Conveyance.*] Making or causing to be made, either within this realm or elsewhere, any *fraudulent grant or conveyance* of any of his lands, tenements, goods, or chattels; or making, or causing to be made, any *fraudulent gift, delivery, or transfer*, of any of his goods or chattels. These two acts of bankruptcy will be considered together, as there is in principle a strict analogy between them: for all those acts which have heretofore been deemed to be fraudulent prefer-

ences will, under the latter of these provisions, be henceforth considered as acts of bankruptcy: *Eden*, 25.

This provision has created a new act of bankruptcy, by extending the operation of the 1 Jac. 1, c. 15, s. 2, to deeds executed *abroad*. It has also created a new act of bankruptcy by the words—"any fraudulent gift, delivery, or transfer, of any of his goods or chattels;" thereby removing a great inconsistency that formerly prevailed in the bankrupt law: for, though a fraudulent gift, or transfer by *deed* was held an act of bankruptcy, it was decided that a sale, or any transfer of goods not by deed, however fraudulent the scheme might be in preference of one creditor to another, and as such void, was, nevertheless, not an act of bankruptcy: *Deacon*, 75; 4 *Burr*. 2478.

The fraudulent conveyances contemplated by this provision are those which are void at common law, or under the stat. of Fraudulent Conveyances, 13 *El.* c. 5; and those which are fraudulent, as being in contravention of the policy of the bankrupt laws, in preventing a fair and equal distribution amongst the creditors, or in preferring one creditor to another. Those conveyances which are void at common law, or under the Statute of Fraudulent Conveyances, will be considered, *post*, "*Trover*," "*Sheriff*;" the present considerations will be confined to those conveyances which are fraudulent, as being in contravention of the policy of the bankrupt laws.

To constitute an act of bankruptcy under the first part of this clause, the conveyance must appear to have been made by *deed*, *Martin v. Pawtress*, 4 *Burr*. 2478, 17 *Ves*. 202, and the deed must be a valid one, therefore, a conveyance by deed without a stamp, *Whitwell v. Dimsdale*, *Pea*. 168, or not executed by a person who must have been a party to it, *Antram v. Chase*, 15 *East*, 212, *Beech v. Gouch*, *Holt*, C. 15, does not constitute an act of bankruptcy; nor does it where, in evidence, it appears that the conveyance was made contrary to the intention of the bankrupt himself: *ex. p. Norris*, 1 *G. & J.* 233. Where the deed was intended for execution by three persons, and was incapable of operation unless executed by them all, the court was of opinion that it could not be considered an act of bankruptcy where executed only by one: *Dutton v. Morrison*, 17 *Ves*. 190.

An assignment of *all* a trader's effects may be an act of bankruptcy, whether it be upon trust for the benefit of one creditor, *Wilson v. Day*, 2 *Burr*. 877, or of several, *Compton v. Bedford*, 1 *W. Bla.* 362, or of all, to the exclusion of one, *ex. p. Foord*, cited 1 *Burr*. 477. And, as it is the execution of the deed that creates the act of bankruptcy, the conveyance produces that effect, although there be a proviso that it shall be void if the trustees think fit, *ib.*, 4 *East*, 230; or if any one of the creditors refuse his acquiescence, *Kettle v. Hammond*, 1 *Cooke*, *B. L.* 106, *Earhart v. Wilson*, 8 *T. R.* 140; or if all the creditors do not sign, or if a commission of bankruptcy be taken out within a given period: *Dutton v. Morrison*, 17 *Ves*. 199; 1 *Rose*, 213. [\*229] It is immaterial whether the assignment is made to secure a present debt, or to indemnify a surety who is only likely to become a creditor: *Hassells v. Simpson*, *Doug.* 89.

An assignment of all a trader's property for the benefit even of all his

creditors will amount to an act of bankruptcy, *Kettle v. Hammond*, 1 *Cooke, B. L.* 89, *Eckhardt v. Wilson*, 8 *T. R.* 140, *Deacon, B. L.* 60, 70; and a condition being annexed to the assignment will not, in general, do away with its effect: *ante*, 228. An assignment, however, to trustees for the benefit of all the creditors, does not constitute an act of bankruptcy, unless a commission issues within six months, and unless the deed is executed by every trustee within 15 days after the execution of it by the trader, and the execution of it, both by the trader and the trustees, be attested by an attorney or solicitor, and notice be given within two months after the execution by the trader (if he reside in London, or within 40 miles thereof), in the London Gazette, and in two London daily newspapers; and if he reside beyond that distance, then in the Gazette and one London daily newspaper, and one provincial newspaper, published near to the trader's residence; which notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor: *s. 4, 6 Geo. 4, c. 16*. And such an assignment will only constitute an act of bankruptcy, when the creditors do not all assent to the deed; as no creditor, who is either a party or privy to the assignment, or has even acted under it, can afterwards set it up as an act of bankruptcy: *Barnford v. Baron*, 2 *T. R.* 594, *n.*; *ex. p. Cawkwell*, 1 *Rose*, 313; 1 *P. Smith*, 118; *ex. p. Crawford*, 1 *Christ. B. L.* 137, 189; *Back v. Gooch*, 1 *Holt*, 13; 4 *Camp.* 232; *Hicks v. Burfitt*, *ib.*, 233, *n.*; *ex. p. Shaw*, 1 *Mod.* 598; 1 *G. & J.* 84; *ex. p. Kilner*, *Buck.* 104; *ex. p. Buttler*, *ib.*, 426. This, however, only estops such a creditor as petitioning creditor, and not a person who may happen to be elected an assignee under the commission, *Tappenden v. Burgess*, 4 *East*, 230; nor is a party estopped from suing out a commission upon a different act of bankruptcy, committed by the trader previously to, and independent of, the deed: *Doe v. Anderson*, 1 *Stark.* 262.

A colourable exception in a grant or conveyance of an inconsiderable part of a trader's property, will not prevent the same being considered as an act of bankruptcy; as, where a trader made an assignment of the bulk of his property (except his household goods, and some other articles), to trustees, in trust for the benefit of themselves, and the creditors mentioned in a schedule, and in which schedule one creditor was purposely omitted, it was considered an act of bankruptcy: *ex. p. Foord*, 1 *Burr.* 477; and see *Barney v. Davidson*, 1 *B. & B.* 408; *Compton v. Bedford*, 1 *W. Bla.* 362. And so, where a trader mortgaged all his stock in trade, excepting household goods and debts, which were very inconsiderable: *Law v. Skinner*, 2 *W. Bla. R.* 996.

An assignment of part of a trader's effects to a particular creditor, as it carries with it no intrinsic evidence of fraud, must, to constitute it an act of bankruptcy, be expressly shown in evidence to have been done in contemplation of bankruptcy, and consequently with the intent to give the grantee a preference over the other creditors; for, generally speaking, a solvent trader has a right to make over any portion of his property that he chooses, either in satisfaction of a debt, or for any purpose: see *Jacob v. Shepherd*, 1 *Burr.* 478. It is only, therefore, when his circumstances are such as must render him unable to pay all his creditors their

demand in full, that an assignment of *part* of his effects to one creditor, can be considered to have been done with *intent* to give that creditor an *undue preference* over the rest, and in contemplation of bankruptcy: *Deacon*, 71. Where a trader, who could only pay 8s. in the pound, and who was threatened with an attachment out of Chancery for not paying a debt, assigned a lease, being part of his estate, to secure certain creditors, \*and then in trust for himself, *Devan v. [230] Watts, Doug.* 85; or where a trader, three days before he absconded, made an assignment to his son (who was a creditor to a much larger amount) of part of his real and personal estate, *Round v. Byde, Co. B. L.* 100; these, and similar transactions, have been considered acts of bankruptcy: *Wilson v. Davy*, 2 *Burr.* 827; *Compton v. Bedford*, 1 *W. Bl. R.* 362; *Butcher v. Easto, Doug.* 282; *Newton v. Chantler*, 7 *East*, 138. So, also, a trader, the night before he absconded, inclosing bills of exchange to a creditor, *Harmon v. Fisher, Cowp.* 117, *vide Wilson v. Balfour*, 2 *Camp.* 579; or making a pretended sale on the eve of bankruptcy, *Rust v. Cooper, Cowp.* 629; or paying a bill of exchange before it became due, *Singleton v. Butler*, 2 *B. & P.* 283; have all been considered fraudulent preferences; and, in a recent case, a voluntary payment, under circumstances which might reasonably lead the creditor to believe bankruptcy probable, though not inevitable, was considered a preference: *Poland v. Glyn*, 2 *D. & R.* 310; *Eden, B.* 30. It is undecided whether a settlement made by a trader previous to, and in anticipation of, marriage, is fraudulent, and an act of bankruptcy; if, however, it can be proved that the wife was a party to any intent to defeat or delay the creditor, such a settlement would be an act of bankruptcy; *ex. p. Rutherford*, 17 *Ves.* 268; *Campion v. Cotton, ib.* Where a trader, being in insolvent circumstances, borrowed £120 of his brother, and, in consideration of this loan, assigned to him one-third of all his effects, and absconded two days after the assignment, though the brother took immediate possession of the goods, and exerted clear acts of ownership, by exposing them to sale, and carrying on the trade, and had not the least knowledge of the insolvency, the court held the deed invalid, by reason of the preference: *Linton v. Bartlett*, 3 *Wils.* 47. And, even where a trader continued to carry on his trade for three years after the execution of a conveyance of part of his property in favour of particular creditors, and the conveyance itself remained in the possession of the bankrupt, it was held to be a question for a jury to consider, whether such a conveyance was not fraudulent, as being voluntarily made, and in order to give an *undue preference*, to the prejudice of the general creditors: *Pulling v. Tucker*, 4 *B. & A.* 382. It need not be proved that the trader actually had in contemplation an act of bankruptcy at the time the creditor pressed for payment or security, and thereby obtained such payment or security; it suffices if, from the facts, such contemplation may be inferred, or that the transaction was fraudulent at common law: *Hartshorn v. Slodden*, 3 *B. & P.* 583; *Crosby v. Crouch*, 11 *East*, 261.

But an assignment of any part of a trader's effects will only be fraudulent, if made in contemplation of bankruptcy, and with a view to prefer one creditor to another; for, if made *bona fide* for a just debt, and

without contemplating such an event, it will then neither be void, nor an act of bankruptcy. As, where a trader, some months before his bankruptcy, assigned certain goods in the hands of his factors, for a particular creditor, in trust for himself and certain other creditors, and the trusts of the deed were at once openly carried into execution, such an assignment was deemed not to constitute an act of bankruptcy: *Jacob v. Shepherd*, 1 Burr. 478. So, the assignment of several debts mentioned in a schedule annexed to the assignment to indemnify the sureties of the assignor, has been held good, the party not becoming a bankrupt till a month afterwards, and not having his bankruptcy in contemplation at the time of the assignment: *Unwin v. Oliver*, 1 Burr. 481.

The mere circumstance of the trader's being in insolvent circumstances, or contemplating insolvency, at the time of the assignment, is not conclusive evidence that he contemplated bankruptcy, there being no fraud, and no design to put the property in a train of distribution different from that of the bankrupt law: *Burney v. Vyner*, 1 B. & B. 482; and see 5 Taunt. 109; 1 B. & C. 5; 2 D. & R. 25. Where A., [\*231] a trader, purchased goods from B. on the 8th October, for exportation, but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them on 16th October to B., and on the 17th he stopped payment; though expecting remittances from abroad more than sufficient to pay his debts, he had no doubt that his creditors would give him time: they, however, refusing he was made bankrupt on 2d November. Under these circumstances, it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy: *Fidgeon v. Sharp*, 1 Marsh. 196.

The assignment must be *voluntary*, to constitute it an act of bankruptcy: 2 B. & P. 583. If a trader give preference to his creditor, under threat, or apprehension of an arrest or legal process, however groundless, such preference is no act of bankruptcy: *Thompson v. Freeman*, 1 T. R. 155. A delivery, under a threat of criminal prosecution, is not an act of bankruptcy, *Carrol v. De Tastet*, 1 Christ. 165; nor is it so where the trader acts under the importunity of his creditor: *Cooper v. Cough*, 1 T. R. 156, n.; *Smith v. Payne*, 6 T. R. 152; *ex. p. Scudamore*, 3 Ves. 85; *Arbonir v. Hanbury*, Holt, C. 504, 575. A trader, complying with an importunate demand for a further security for a debt not yet due, does not thereby commit an act of bankruptcy: *Crosby v. Crouch*, 2 Camp. 168; *Hartshorn v. Slodden*, 2 B. & P. 582. Where a trader, without solicitation, and in contemplation of stopping payment, put three checks into the hands of his clerk, to be delivered to a creditor, at the counting-house of the latter, but, before delivery, the creditor called upon the trader, and demanded payment of his debt, it was ruled, that the intention of making a voluntary preference not having been consummated, the payment stood good: *Bayley v. Ballard*, 1 Camp. 416. But, where a trader, being pressed for payment or security, gave a bill of sale of apparently the whole of his stock, the court held that, inasmuch as the act did not redeem him even from any present difficulty, which is the ordinary motive for such an act, when done under the pressure of a threat, it was evident it was not done under such pressure, but

voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy: *Thornton v. Hargreaves*, 7 East, 544. And, where a trader, on being pressed, conveyed estates in trust to sell, and pay the pressing creditor, with a further trust to pay debts to certain relatives, the court considered this to be an undue preference, in contemplation of bankruptcy, and an act of bankruptcy: *Morgan v. Horseman*, 3 Taunt. 241; *Eden*, 32. Where the acceptor of a bill, two days before the expiration of the time for which the bill was originally drawn, called upon the endorser, and informed him, privately, that he was insolvent; the endorser insisted on being paid the amount of the bill, offering, at the same time, to become security to the creditors for so much as the estate should produce; whereupon the acceptor paid it, and, four days afterwards, became a bankrupt; it appeared, also, that the bill had been altered, so as to make it fall due before this transaction, but without the endorser's knowledge: these circumstances were held sufficient evidence of a fraudulent preference, and act of bankruptcy: *Singleton v. Butler*, 2 B. & P. 283.

The assignment must be proved to be of the trader's own property, and not of property conveyed by another person, *to or in trust for him*. Where A. and B., being partners and insolvent, A. assigned certain property to B., in trust for the wife of B. (who was a daughter), it was held to be no act of bankruptcy by B., though he was a party to the deed: *Whitwell, v. Thompson*, 1 Esp. Rep. 68, 71. A return to the lender of a check given for a specific purpose, and not applied to it, would not, it seems, be considered fraudulent, so as to constitute an act of bankruptcy: *Moore v. Barthrop*, 1 B. & C. 5; 2 D. & R. 25.

*As to the mode of Proving the Grant, Conveyance, or Transfer, \*&c.* In the case of a deed, it must be proved in [\*232] the usual way, by calling a subscribing witness: *post*, "Deed." An admission by the deft. of the deed, will not dispense with this evidence, not even if the deft. is a party to the deed, *Abbott v. Plumbe*, 1 Doug. 216, 4 East, 58, and notwithstanding the deft., at the trial, should produce the deed, in compliance with a notice: *Gordon v. Secretary*, 8 East, 548. But, if the deft., in pursuance of a notice, produces a deed to which he is not only a party, but under which he holds property, or claims any beneficial estate, it will then not be necessary that plt. should call an attesting witness to prove the execution: *Pearce v. Hooper*, 3 Taunt. 82; *Orr v. Morise*, 3 B. & B. 139; *Deacon*, 771. And, upon this principle, it seems that, where a fraudulent bill of sale is given by the bankrupt to the deft., the admission by the bankrupt, of the execution of the deed, in his examination before the commissioners, would, in an action of trover, brought by the assignees to recover the property claimed by the deft., under the deed, supersede the necessity of calling the subscribing witness: *Bowles v. Lacyworthy*, 5 T. R. 366. It has been held, that an agreement not stamped cannot be received as evidence, even to show that the party meant to commit a fraud by such deed, *Whitwell v. Dimsdale*, Pea. Rep. 167: however, the conveyance will enure, as an act of bankruptcy, although it is void through fraud, as in the case of an insolvent trader, who conveys to an infant son, *Whitwell v. Thompson*, 1 Esp. Rep. 68. As to the proof of a gift



or transfer, that must depend on the particular circumstance of the case. Where a deed cannot be produced before the commissioners, they may receive parol evidence of its contents, *ex. p. Cawkwell*, 19 Ves. 234; and, where the party, in whose possession it is, refuses to produce it, he may be committed, 6 G. 4, c. 16, s. 24, *Buck*. 17. To prove the fraudulent nature of the conveyance or transfer, proof may be inferred from extrinsic circumstances, as the situation of the trader and his affairs, &c., as well as from the deed itself, or from the grant or transfer. The circumstances which, extrinsic of the deed, usually afford evidence of fraud, are the embarrassed state of the trader's affairs, or that he was actually insolvent at the time, and that he knew that he was so, *Newton v. Chantler*, 7 East, 138; and was on the eve of a contemplated bankruptcy, *Devon v. Watts*, 1 Doug. 85; that he intended to give an undue preference to a particular creditor, *Morgan v. Horseman*, 3 Taunt. 241; and this is proved by his conduct, and cotemporary declarations, or other acts; that he executed the deed at an unseasonable hour of the night, or under other suspicious circumstances: *Compton v. Bedford*, 1 Bl. R. 362. And it would be sufficient to show in evidence, that this would be the effect of the conveyance; and it would be no answer to show, that, as between the parties themselves, the transaction was fair and honourable, *Montague's B. L.* 66, and for a good and valuable consideration, or that it was the result of importunity, *Butcher v. East*, Doug. 294; or even of compulsion, *Newton v. Chantler*, 7 East, 135, on the part of the creditor, if the necessary consequence would be to give an undue preference to one or more creditors, to the prejudice and exclusion of the rest, *Worsley v. Demattos*, 1 Burr. 467; though it might show the trader's solvency at the time of executing the deed, and the benefit resulting to the creditors in general.

Though *remaining in possession* of the property after the assignment is *prima-facie* evidence of fraud; *post*, 237, "*Trover*," yet, when such possession is given to the creditor as the nature of the case will admit, that will remove any imputation of fraud, as, in cases where the goods are bulky, or in a place of distant deposit, there cannot be an actual delivery; in which case, a delivery of a symbol of ownership will then be sufficient: *Manton v. Moora*, 7 T. R. 67; *Barney v. Davison*, 1 B. & B. 408; 4 Moo. 126; *ib.* 482; *post*, "*Trover*." Where a trader assigned all his estate and interest in certain premises, and also all his stock in trade to a particular creditor, for the purpose of [\*233] securing him the repayment of advances, at the same time remaining himself in possession of every thing conveyed by the deed, and having in fact nothing of value, but what was comprised therein, he was held to have committed an attack of bankruptcy: *Worsley v. De Mattos*, 1 Burr. 467. And, so, where a trader, finding he could not stand his ground, assigned to one of his creditors every thing he had in the world, to secure an unliquidated debt, keeping possession of the property, and giving a letter of attorney to his own clerk, to collect in the debts: *Wilson v. Day*, 2 Burr. 927.

It must be remembered, that the *intent and purpose* of the bankrupt, in making the grant or conveyance, must be always considered in deciding whether such grant or conveyance was fraudulent, and contrary

to the policy of the bankrupt laws: *ante*, 224. The intent must be to *defeat and delay* the trader's creditors. An assignment made by a trader resident in India, of all his effects, in trust for creditors, in certain proportions, agreed upon by all parties there, has been held not to be an act of bankruptcy, the transaction appearing perfectly fair at the time, and without any fraudulent intention: *Ingليس v. Grant*, 5 T. R. 530.

*Making or causing to be Made, any Fraudulent Surrender of any of his Copyhold Lands or Tenements.*] This is an act of bankruptcy created to remedy an inconvenience in the old law, under which it was held, that no process of execution could issue to levy a debt upon a copyhold estate. And a surrender of copyhold property, however fraudulent, was not an act of bankruptcy: *ex. p. Cockshott*, 3 Bro. C. C. 502; 1 Cooke, B. L. 162.

*Lying in Prison.*] Any trader, having been arrested or committed to prison for debt, or any attachment for non-payment of money, and thereupon, or on any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lying in prison for 21 days, or having been arrested or committed to prison for any other cause, lying in prison for 21 days, after any detainer of debt lodged against him, and not discharged, he shall be thereby deemed to have committed an act of bankruptcy: 6 Geo. 4, c. 16, s. 5. There needs no intent to delay creditors on the part of the trader, to constitute any of these acts an act of bankruptcy: 9 East, 487. The arrest must be a legal arrest, and it will be insufficient to ground an act of bankruptcy, however lawful it subsequently becomes, if it were illegal in its conception: *Deacon*, 77. The debt for which the arrest is made, must be a real subsisting legal debt. Therefore, an arrest by an executor before probate, is insufficient, 3 Lev. 439; *T. Raym.* 478, s. c.; so an arrest on a bond, before the day of payment, and so is an arrest on an equitable demand, when the remedy is by bill for specific performance: *ex. p. Hillyard*, 1 Atk. 147; 2 Ves. 407; *Eden*, B. L. 35. A penalty due to the crown is a sufficient debt: *Cobb v. Symonds*, 1 D. & R. 111; 5 B. & A. 516, s. c. And a party lying in prison under a magistrate's warrant of commitment, in force at the time he was under civil process for debt, is an act of bankruptcy: *Rex v. Page*, 7 Price, 616; 3 Moo. 656; 1 B. & B. 368, s. c.; *Eden*, 34.

The lying in prison must be for the uninterrupted period of, and the bankrupt must be in actual custody, 21 days, under the arrest or commitment; and, where an interruption has taken place, the act of bankruptcy will have relation to the first day of the subsequent imprisonment: *King v. Leith*, 2 T. R. 141; *Coppendale v. Brigden*, 2 Burr. 814. As, where a trader is arrested, and, before the expiration of the 21 days, is bailed out, and afterwards render in discharge of his bail, and remain in custody 21 days, it is the second imprisonment, from the time of his render, which constitutes the act of bankruptcy; *Tribe v. Webber*, *Willes*, 464, *ex. p. Dufresne*, 1 B. & B. 50; *Cane v. Coleman*, 1 Salk. 109; or, where he is allowed to go at large for a few days, the period is computed from his return: *Barnard v. Palmer*, 1 [\*234] *Camp.* 509. But, where the bail is matter of form, and put

in without justification, only with the view of turning the party over from the custody of one party to that of another, it is considered a continuation of the same imprisonment, and the 21 days may be reckoned from the first arrest: *Rose v. Green*, 1 *Burr.* 437. The word prison does not necessarily mean the county gaol, or any of the county prisons; it will suffice that the bankrupt was in actual custody during the 21 days. Where a trader was arrested in his own house, but, being too ill to be removed, remained there in custody of the follower of the sheriff's officer, and was afterwards imprisoned, the period was held to commence from the day of the arrest, *Stevens v. Jackson*, 1 *Marsh.* 464; 4 *Camp.* 164, *s. c.*; but see *Benton v. Sutton*, 1 *B. & P.* 24; and so, where the party has the benefit of the day rules, the period is not considered to be interrupted, for he is still deemed to be in custody: *Soames v. Watts*, 1 *C. & P.* 400. Where a trader is in custody at the suit of one plt., and is detained at the suit of another, the period will be computed from the detainment: *Croppendale v. Bridgen*, 2 *Burr.* 814. The docket being struck previous to the expiration of the 21 days, will not affect the act of bankruptcy. But the commission cannot be supported, unless issued subsequent thereto: *Gordon v. Wilkinson*, 8 *T. R.* 537; *ex. p. Dufresne*, 1 *V. & B.* 51; 1 *Rose*, 333. The day of the arrest or going to prison, is reckoned the first day, or part of the 21 days, and on the termination of the whole of the last day, the act of bankruptcy will be complete: *Glassington v. Rawlins*, 3 *East*, 407; *Saunderson v. Greg*, 3 *Stark.* 72.

In order to prove an act of bankruptcy by lying in prison, the arrest, detention, and cause of such arrest or detention, must be proved. The arrest may be proved by an examined copy of the writ and the return of *cepi corpus*, or by proof of the writ, the warrant, and the arrest: see *post*, "*Sheriff*," *index*, "*Arrest*." The detention may be proved by producing the prison books, containing entries of the dates of the several commitments and discharges to and from prison, *Rex v. Lickles*, 1 *Leach*, 436; but they are not evidence of the *cause* of the commitment, for the commitment itself is higher proof, and, if in existence, ought to be produced: *Salte v. Thomas*, 3 *B. & P.* 188.

*Escaping out of Prison or Custody, after having been Arrested, Committed, or Detained for Debt.*] No evidence of debt's intent to delay his creditors is necessary to constitute this an act of bankruptcy. The arrest, committal, or detainer, must be legal: see *ante*, 233. The statute comprehends every arrest for debt, whatever the amount may be for which the trader is arrested: *Deacon*, 81. The escape must be with an intention of running away, and against the will of the officer; and it must not be by mere implication. Therefore, where a trader prisoner was carried, by permission of the sheriff, through a different county, on his road to a judge's chambers, upon a *habeas corpus*, to be committed to another prison, it was helden not to be an escape within the bankrupt statutes: *Rose v. Green*, 1 *Burr.* 437. The act of bankruptcy, in this case, by the words of the statute, is from the time of the arrest, commitment, or detainer.

*Filing a Declaration in the Office of the Secretary of Bankrupts, signed by himself, and attested by an Attorney or Solicitor, that he*

*is Insolvent, or unable to meet his Engagements.*] This is constituted an act of bankruptcy by the recent act. The requisites of this act of bankruptcy are, that the secretary of bankrupts, or his deputy, must sign a memorandum that the *declaration of insolvency* has been duly filed, as an authority to insert an advertisement of it in the Gazette; that the advertisement must be inserted in the Gazette within eight days after filing the declaration; and, after which, the declaration will be considered an \*act of bankruptcy, committed at the time when [\*235] the declaration was filed: *Deacon*, 83. A commission, to be supported upon this act of bankruptcy, must be sued out within two calendar months after the insertion of the advertisement in the Gazette; and a docket in a *London* commission cannot be struck before the expiration of four days after the insertion of the advertisement, nor before eight days, in a *country* commission. The Gazette containing the advertisement is to be evidence of the declaration having been filed in all proceedings before the commissioners. No commission founded on this act of bankruptcy will be invalid, by reason of the declaration having been *concerted* or agreed upon between the bankrupt and any creditor, or other person: *s. 7, 6 Geo. 4, c. 16.*

*Any Trader, after a Docket struck against him, either paying Money, or giving or delivering any Satisfaction or Security for his Debt, or any part thereof, to the Person striking the Docket against him whereby such person may receive more in the Pound, in respect of his Debt, than the other Creditors.*] A commission issuing upon such a docket may be either proceeded in or superseded, as the Lord Chancellor shall think fit; in which latter case, a new commission may issue, either upon this or any other act of bankruptcy. The petitioning creditor, as a penalty for such compounding, forfeits his whole debt, and may also be compelled to repay or deliver up the money or security he has received, or the full value thereof, to such person as the commissioners shall appoint, for the benefit of the creditors of the bankrupt: *ex. p. Thompson*, 1 *Ves.* 157; *ex. p. Paxton*, 15 *Ves.* 464; *ex. p. Brown*, *id.* 473; *ex. p. Brine, Buck*, 19, 108; see *Deacon*, 84.

*Filing a Petition to take the Benefit of the Insolvent Act.*] This is an act of bankruptcy, created by the Insolvent Act, 7 *Geo. 4, c. 57, ante*, 222. The act provides that no commission shall issue upon it after an order for immediate or future discharge by the court: *ante*, 222.

*Members of Parliament committing an act of bankruptcy, by neglecting to make Payment or Satisfaction, and entering Appearance within one Month, after Personal Service of Summons for Debt: ante*, 222.] The debt must be of the amount required for a petitioning creditor in other cases. If, after personal service, the trader does not, within one month, pay, secure, or compound, or enter into a bond with two sureties, before a judge of the court out of which the summons issued, and enter an appearance to the action within one month, it is an act of bankruptcy: *Eden*, 37. It has been said, that, though some of the circumstances attending this act of bankruptcy must be proved by a creditor, yet, as necessity alone justified the exception to the rule, that his testimony could only be received as to facts of which evidence could not be obtained from other sources, that the commissioners ought to pro-

ceed upon direct evidence, as to the character of the person, not upon depositions incorporating the substance of an affidavit, in which, in another court, those essentials had been attested: *ex. p. Harcourt*, 2 *Rose*, 203. It seems, also, that it ought to appear that the summons required to be served was taken out after the affidavit was filed: *Eden*, 37.

*Members of Parliament* commit an act of bankruptcy, by *disobeying the Order of Court to pay Money.*] This comprises decrees and orders made in equity, and orders in bankruptcy or lunacy. The party to whom the money is to be paid, is to apply to the court for a peremptory day, with the order for which the trader is to be served eight days previous to the appointed day for payment: *Eden*, 38; 1 *P. W.* 782.

Before concluding this branch of evidence relative to the act [\*236] of bankruptcy, it is to be observed, that the plt., or opposite party is not restricted in proof to the *specific* act of bankruptcy, upon which the commission was founded; he may repudiate that and rely on any other: *Reed v. James*, 1 *Stark.* 134. If, indeed, the Lord Chancellor directs an issue or action at law, though, in general, he will permit no other acts of bankruptcy to be given in evidence, yet, this being considered a favour to the party endeavouring to support the commission, such party will be required to show, by affidavit, on what particular acts of bankruptcy he relies, and to give notice to the other party by what evidence he intends to prove his case: *ex. p. Burgess v. Bush*, 233; *ex. p. Bogen*, *ib.* 137. Where, indeed, the commission was proved on the trial of an issue, to have been founded on a concerted act of bankruptcy, Lord Eldon refused to direct another issue, with liberty to prove other acts: *ex. p. Rosser, Buck*, 77.

The act of bankruptcy, whether it be the specific one on which the commission was founded, or not, must be proved to have been committed *before* the issuing of the commission, and *after* the petitioning creditor's debt was contracted: *ex. p. Wamman*, *C. B. L.* 23. It is immaterial how many acts of bankruptcy may have been committed by the bankrupt, 6 *Geo.* 4, c. 16, s. 19, or how recently the act of bankruptcy was committed before the commission was issued: *Hopper v. Richmond*, 1 *Stark.* 507. If the issuing of the commission and the act of bankruptcy happen on the same day, evidence is then admissible against the assignees, to show that the commission was issued (that is, sealed) before the act of bankruptcy: *Wydown's case*, 14 *Ves.* 80. A verdict upon an issue directed out of chancery, to which only one of the debts was a party, may be received against all the debts., to prove the *time* of the act of bankruptcy: *Loufield v. Bancroft*, *B. N. P.* 40.

The act of bankruptcy must be proved by some person who can speak to the fact from his own knowledge. If the execution of a deed constitute it, see the mode of proof, *ante*, 231-2. As to the mode of proving the bankrupt's intent, *ante*, 224. As to proving bankrupt's imprisonment, *ante*, 234.

**CAUSE OF ACTION.** *Evidence in Action to recover the Personal Property of Bankrupt in general.*] The present and all the future personal property of the bankrupt, until his certificate be obtained,

whosoever it be, by the assignment, is vested in the assignees, for the benefit of the bankrupt's creditors. The bankrupt, however, is allowed to retain all the necessary wearing apparel for himself, his wife, and family. Property obtained by the bankrupt by fraud, will not pass to the assignees, but will still remain the property of the party defrauded, *Harrison v. Walker*, *Pea. Rep.* 111, *Gladstone v. Hadween*, 1 *M. & S.* 517, and see 1 *Stark.* 109, 12 *East*, 656; but, if the property be obtained upon a contract of sale, though with intent to defraud, it will pass to the assignees: *Millward v. Forbes*, 4 *Esp. Rep.* 171; *Harwell v. Hunt*, 5 *T. R.* 231, *n.* As to stock in the funds, see 6 *G.* 4, *c.* 16, *s.* 80.

Property of the wife, which comes to the husband either upon the marriage, or after it, vests in the assignees, upon his bankruptcy, the same estate which the husband has in it by law; see *Com. Dig. Bankrupt, D. 2*; *Mace v. Cadell*, *Cowp.* 232; *Archb.* 164. Debts and choses in action of the wife, unsettled, vest in the assignees upon the husband's bankruptcy: *Turner's case*, 1 *Vern.* 7. Property vested in trustees for the wife's separate use, does not vest in the assignees: *Bennet v. Davies*, 2 *P. Wms.* 316; 10 *Ves.* 139; *Archb.* 165. As to marriage settlements, *ante*, 229, 234.

The evidence in support of this cause of action must necessarily depend on the property sought to be recovered, or the wrong that has been done to the bankrupt in his right thereto. The bankrupt's right must be \*proved in the same manner as if he were plt. [\*237] See the various titles of action throughout the work.

*Evidence in Action to recover the Debts, Contracts, and other Choses in Action, of the Bankrupt.*] All debts due or to be due to the bankrupt, whosoever the same may be found or known, are, by the 6 *G.* 4, *c.* 16, *s.* 63, to be assigned to the assignees by the commissioners; and such assignment will vest in them the property, right, and interest, in such debts, as fully as if the assurance whereby they are secured had been made to such assignees: see 1 *Swanst.* 85. So, the assignees have the benefit of all contracts made with the bankrupt, particularly if made for a valuable consideration: *Schöndles v. Wace*, 1 *Camp.* 487; *Splidt v. Bowles*, 10 *East*, 279. The assignees, however, are only entitled to the benefit of contracts in which the bankrupt was beneficially interested, see 2 *Vern.* 194; 3 *B. & P.* 40; 10 *East*, 279; 3 *East*, 320; 1 *T. R.* 619; and the assignees are bound by the agreements of the bankrupt made before the bankruptcy, where such agreements are set up as a defence to any proceeding upon the part of the assignees: see *Dobson v. Lockhart*, 5 *T. R.* 133. So they take all the bankrupt's debts, rights, and choses in action, &c., subject to the same rights which the bankrupt had over them: see *Wallace v. Hardacre*, 1 *Camp.* 46; *Willis v. Freeman*, 12 *East*, 656; *ex. p. Harrison*, 2 *G. & J.* 93; 1 *Str.* 555; 3 *P. Wms.* 146; 5 *D. & R.* 608. A right to bring a real action passes to the assignees, *Smith v. Coffin*, 2 *H. Bla.* 451; so does a right of action for a compensation under an act of Parliament, 17 *Ves.* 343; but a right of action for a tort, as for slander, *Wm. Jones*, 215, or for a trespass, 3 *Moo.* 96, does not pass to the assignees: *Arch.* 136. An action will lie by the assignees for money lost by the

bankrupt at play: 2 *H. Bla.* 308; 2 *Ves.* 514; 2 *D. & R.* 575; 1 *B. & C.* 444, *s. c.*

The evidence of the cause of action will be found under the various titles of actions throughout the work. It must be established in the same manner as if the bankrupt himself were suing.

*Evidence in Action, to recover Property claimed by Plaintiffs, as being in the Bankrupt's Possession, as Reputed Owner.*] By the 6 *G. 4, c. 16, s. 72*, it is enacted, "If any bankrupt, at the time he becomes a bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same, for the benefit of the creditors under the commission," provided that nothing therein contained shall invalidate any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt, either by way of mortgage or assignment, only registered according to the provisions of the new Registry Act: 4 *Geo. 4, c. 41, s. 44*. The object of this enactment is for the protection of the general creditors of a trader, against that false credit which might be acquired by his being suffered to have the possession and power of disposition of property as his own, which does not really belong to him; and evidence must therefore be adduced accordingly.

It would be beyond the limits of this work to enter into a detail of the various cases that have been decided on this section of the act; they will be found collected in *Eden*, 271, *Deacon*, 403, *Archb.* 137. It must be proved that the property was goods and chattels of a *personal* and moveable nature; that the bankrupt had them in his *possession, order, or disposition, as the reputed owner*, and that by the *consent and permission of the true owner*, and *at the time he became a bankrupt*.

The possession of property is *prima-facie* evidence of reputed ownership, and more or less strong, according to the circumstances under which it was obtained or retained: *Deacon*, 405. It is, however, a question of fact for the decision of the jury, *Dough* 317, 1 *B. & P.* 89; and the true criterion for determining every question as to reputed ownership seems to be whether or not the bankrupt had such a possession as would *deceive his creditors*, by any appearance of the property forming that part of the stock to which they might reasonably give credit: *ex. p. Marrable*, 1 *G. & J.* 402; *Deacon*, 411. When a bankrupt has once been the ostensible owner of property, and he continues in the visible possession of it at the time of his bankruptcy, that is a very strong case of reputed ownership, and can only be rebutted by clear proof, not only that there has been a transfer of the property from the bankrupt, but that such transfer was notorious to the world; for, when a man has been at one time the real owner of property, the presumption is, that he continues so, where there is no change of possession: *p. Holroyd*, 1 *B. & C.* 314; *Deacon*, 405. The possession, however, must always be accompanied with some evidence of reputation, and the mere continuance in possession by an assignor (under peculiar embarrassments) of property assigned, though always suspicious, is not of itself a *conclusive* badge of fraud, *Hoffman v. Pitt*, 5 *Esp. Rep.* 25,

*R. & M.* 312, *Deacon*, 406; and in all cases where facts are proved, amounting to a disposition of the property by the bankrupt as owner, *general evidence* may be given of his being *reputed* to be the owner: *Oliver v. Bartlett*, 1 *B. & B.* 269; and see 1 *M. & S.* 335. But the inference of ownership from possession, and even from reputation of ownership, may be rebutted by evidence contradicting that reputation: *Gurr v. Rutton, Holt, C. H. P.* 327; *Deacon*, 406. In all cases where the *best delivery* is made upon the sale of goods which the nature of the property sold, and the circumstances under which it is sold will admit, the case will not then be considered as one of reputed ownership: see *Manton v. Moore*, 7 *T. R.* 67. The possession of goods for a specific purpose, or of money, if kept separate, is not in general within the act, *West v. Ship*, 1 *Ves.* 243, 3 *T. R.* 323, *Rex v. Egginton*, 1 *T. R.* 370, 9 *East*, 14; and the statute does not extend to property which the bankrupt holds in *autre droit*, or as trustee: *Eden*, 244; *Deacon*, 557; *Archb.* 167 to 171. The possession of a factor, banker, or broker, is not general within the act: see *Deacon*, 426 to 439. Independent of any consideration of bankruptcy, it is a general rule of law, that all secret sales, and transfers of personal property unaccompanied by possession, are fraudulent and void as against creditors, since the effect of them is to enable a party to gain a false credit from the world; *Deacon*, 406; *Edwards v. Harben*, 2 *T. R.* 587; 1 *Camp.* 333; *Bamford v. Baron*, 2 *T. R.* 594; *Toussant v. Hartoop, Holt*, 335.

*Evidence in Action to recover Property delivered by Bankrupt in Contemplation of Bankruptcy.*] If a trader, knowing himself to be on the eve, and in contemplation of, bankruptcy, voluntarily give or assign goods, money, or other property, to one of his creditors, with a view of giving him a preference over others, or to defeat the claims of his creditors generally, such assignment or transfer is void as against the other creditors; and, upon the bankruptcy of the trader, his assignees may recover the property from the creditor thus preferred: *Crosby v. Crouch*, 2 *Camp.* 166; 11 *East*, 256; 2 *Camp.* 579; *Coup.* 629. This preference, however, must be proved to have been made in contemplation of bankruptcy, at the time of such preference; and, if it appear that the bankruptcy was not contemplated at the time, although it actually did take place afterwards, the property assigned to the creditor will not be recoverable by the assignees: *Wheelwright v. Jackson*, 5 *Taunt.* 109; 1 *Marsh.* 196; 1 *Ves.* 280. But, if the assignment or transfer took place under circumstances which might reasonably lead the debtor to believe his bankruptcy probable, though not inevitable, it will be sufficient to invalidate the transaction: \**Roland v. Glynn*, 2 [\*239] *D. & R.* 310; *ante*, 229. The transfer must be proved to have been voluntary: if made under compulsion, or any apprehension of annoyance from, or even from the importunity of the creditor, it will not be within the act: see *ante*, 231. Where the transfer or delivery of property upon the importunity of a creditor does not redeem a trader from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, this will be evidence that the transfer was not made under such pressure, but voluntarily and with a view to prefer a particular creditor, in contemplation of



bankruptcy: *Thornton v. Hargreaves*, 7 *East*; 544. The transfer must be proved to have been made with a view of giving the creditor a preference over others; a voluntary transfer is good, if made *bona fide*, and not from a motive of undue preference: *Dixon v. Baldwin*, 5 *East*, 175. A payment in the fair course of business, or in pursuance of a previous agreement, would not be a fraudulent preference: see *Rust v. Cooper*, *Cowp.* 629; *ib.* 117; *Mavor v. Croome*, 1 *Bing.* 261; *Guthrie v. Crossley*, 2 *C. & P.* 301. A delivery of goods under a pretended sale, or an absolute sale, with an intention to prefer will be fraudulent: *Harris v. Limell*, 1 *B. & B.* 390; *Alderson v. Temple*, 4 *Burr.* 2235. In all questions on this subject, the relative situation in which the bankrupt and the creditor stand with each other at the time of the transfer, should be considered. And see further, as to this right of the assignees, *ante*, 228, as to how far a fraudulent preference constitutes an act of bankruptcy.

*Evidence in Action to recover Property delivered by Bankrupt voluntarily, without Consideration.*] Property voluntarily conveyed by a trader, without valuable consideration, and which conveyance would be void as against his creditors, by statute 19 *El. c. 5*, will pass to the assignees under the assignment; or bargain and sale, and may be recovered by them; see *Glaister v. Hewer*, 8 *Ves.* 195; 9 *Ves.* 12; 11 *Ves.* 377; 9 *East*, 59; *Archb.* 160. Money is not within the act: *Kensington v. Chantler*, 2 *M. & S.* 36. A settlement made after marriage will not prevent the property settled from vesting in the assignees of the husband, on his bankruptcy, *ex. p. Bell*, 1 *G. & Y.* 275, 1 *Atk.* 93; unless, indeed, it be made in consideration of a portion, or a new additional sum received with, or in right of the wife, or of an agreement to pay the money, if it be afterwards paid, *Cook*, 293, *Archb.* 163; or, unless it be made in pursuance of articles entered into before marriage, *Archb.* 105; or, unless it were made without fraud, before the husband entered into trade, and at a time when he was not indebted: *Battersbee v. Farington*, 1 *Swanst.* 106. A settlement made by a trader, before marriage, on his intended wife and issue, will be valid, as against the assignees; and this, though he received no portion from his wife, marriage being a valuable consideration: *ex. p. Cottrell*, *Cowp.* 742. And, if a man, upon his marriage, settle personal property for the separate use of the wife, to enable her to carry on a separate trade, his living with the wife will not give him such a possession, order, or disposition of the property, as to vest them in his assignees on his bankruptcy: 3 *T. R.* 620. If, however, the husband himself take any interest by the settlement, as an estate for life, or the like, it of course passes to the assignees: 2 *Atk.* 558; *Archb.* 163.

By the 6 *G. 4, c. 16, s. 73*, if any bankrupt, being at the time insolvent; shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose

of the same, as therein mentioned; and every such sale shall be valid against the \*bankrupt, and such children and persons [\*240] claiming as aforesaid, and against all persons claiming under him: see 3 *Merr.* 702; *Cro. Car.* 548.

*Evidence in Action to recover Property of Bankrupt seized under an Execution.]* By the 81st sect. of the 6 *Geo.* 4, c. 16, executions and attachments levied on a trader's property two months before a commission issued against him will be valid. The execution creditor, however, must not have had notice of a prior act of bankruptcy, *ib.*; and, by the 108th sect., execution creditors are put on the same footing as others, and must receive only a ratable part of their debts, unless the levy be made before the act of bankruptcy; and, by the same section, creditors levying an execution on a judgment by default or confession, are not to be preferred: see further, these sections, *post*. An execution merely tested or delivered to the sheriff before the bankruptcy, is insufficient; the property must be actually seized under the execution, before the act: *Stead v. Gascoigne*, 8 *Taunt.* 527; *Cole v. Davis*, 1 *Ld. Raym.* 724; 5 *Moo.* 313; 3 *Lev.* 69, 191. If the execution be fraudulent or collusive, the assignees may recover the property seized, or their proceeds: see 2 *Camp.* 48; 1 *Holt*, 335; 1 *H. Bla.* 665; *ante*, 227.

*Evidence in Action, to recover Goods which have been stopped in Transitu.]* If a bankrupt has purchased goods, but the same are not delivered to him, and they still remain in the hands of the vendor, inasmuch as he has a lien on them for the purchase-money, the assignees, until they satisfy the vendor in that respect, cannot get possession of them, so as to dispose of them for the benefit of creditors; if the vendor have sent them, but they have not as yet been delivered to the bankrupt, the vendor may stop them *in transitu*; but, when the goods have been delivered to the bankrupt, then, of course, they pass to the assignees: *Archb.* 154. See, as to when a party has a right to stop goods *in transitu*, *post*, "*Trover, Defences in.*" The point generally in dispute, is, as to whether or not there has been an actual delivery to the bankrupt.

*Evidence in Action to recover Property in hands of Party who claims a Lien over it.]* The assignees do not take a better title over the property of bankrupt, than he himself had at the time of his bankruptcy; and, if, therefore, the holders of it have a claim or lien therein, as against the bankrupt, they have it also against the assignees. The requisites to support a legal lien on property, with the evidence to support or disprove it, will be found, *post*, "*Trover, Defences in.*"

*Proof of Defendant's Notice of Bankruptcy.]* If the plt. seeks to recover money or property which he could not by virtue of the 81, 82, and 84, of the 6 *Geo.* 4, c. 16 *post*, without deft. had notice of an act of bankruptcy committed, he must adduce evidence of such notice. Independently of the ordinary evidence of the parties having had knowledge of such fact, either actual or to be implied from circumstances, it is enacted by the 83d sect., that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued, shall have been notified in the London Gazette, and the per-

son or persons to be affected by such notice may reasonably be presumed to have seen the same: see 8 *Taunt.* 176. And, by sect. 85, if any accredited agent of any body corporate, or public company, shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice.

[\*241]

*\*Evidence for Defendant.*

The evidence for the defence will consist either; 1st., in endeavouring to controvert the title of the plts. as assignees, or, 2dly., their cause of action.

We have already seen in what cases the plt. must adduce evidence of his *title* to sue as assignee, and what steps must be taken by deft., as giving a notice, &c., to render it incumbent on plt. to adduce *strict* evidence of such title, *ante*, 207; and when deft. is estopped from disputing the title, *ante*, *ib.* We have also seen the *mode* in which plt. must prove his title: where deft. has given no notice to dispute it, *ante*, 208; where the commission has not been disputed by the bankrupt within a limited period, *ante*, 209; and where strict proof of title is necessary, *ante*, 211. Under these observations will be also found, how far deft. will be able to contest and controvert the plt.'s title, and his evidence must be framed accordingly. If a notice has been given by deft. to dispute the bankruptcy, &c., he should adduce evidence of such notice in the usual way: *post*, "*Secondary Evidence.*" If the form of action or the form of pleadings be improper, plt. will be nonsuited; as to which, see *ante*, 198, 201. If the plt. has omitted to join one of the assignees under the commission, the non-joinder may be taken advantage of, as a ground of nonsuit: 1 *Ch. R.* 71; 2 *Stark.* 424.

We have seen what evidence the plt. must adduce in support of the *cause of action*, and what may be shown by deft. to impeach it: *ante*, 238 to 240. The deft. may prove that the right of action did not vest in the assignees. The question, whether or not a particular interest vests in the assignees, is a question of law, depending on the facts brought forward in evidence from the plt.'s or deft.'s proofs: see 2 *Stark. Ev.* 195. If plt. sues in an improper form of remedy, *ante*, 198, or there be a variance in the declaration, *ante*, 202, he will be nonsuited.

A discharge by one assignee on receiving moneys due to the estate, will bind the rest; *Smith v. Jameson*, 1 *Esp. Rep.* 114; 2 *Stark. Ev.* 199; *sed vide Carr v. Head*, 3 *Atk.* 695; but a discharge by one assignee will not be effectual, where the others have expressly dissented: *Bristow v. Eastman*, 1 *Esp. Rep.* 172. So, a release executed by one assignee, in the presence of another, will bind both, *Williams v. Walsby*, 4 *Esp. Rep.* 220; but, if the co-assignee be absent, an express authority by him, under seal, must be proved: 4 *T. R.* 319; 2 *Stark. Ev.* 200.

*Defence that the Conveyance, Contract, Execution, &c., through which the Property sought to be recovered against Defendant was conveyed to him, was without notice, &c.*] By the general operation of the bankrupt laws, as we have before seen, all the property of the bankrupt, from his act of bankruptcy, becomes vested in the assignees, so that the bankrupt has no power whatever to dispose of the same

against their consent. Many inconveniences and hardships having been experienced in trade from this title of the assignees, the 6 G. 4, c. 16, s. 81 (which adopts some parts of the prior enactments in 46 G. 3, c. 135, s. 1, and 49 G. 3, c. 121, s. 2), enacts, that all conveyances by, and all contracts, and other dealings and transactions, by and with any bankrupt, *bona-fide* made, and entered into, *more than two calendar months* before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels, of such bankrupt, *bona-fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act, of bankruptcy by him committed, provided the person or persons so dealing with such bankrupts, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, \*con- [\*242] tract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided, also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, &c., shall be valid, unless made, &c., more than two calendar months before the issuing of the first commission. We have already seen what will be evidence of a notice of an act of bankruptcy, *ante*, 240.

By sect. 86, no *purchase* from any bankrupt *bona-fide*, and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

As to executions upon judgments entered upon warrants of attorney or cognovits, see 3 G. 4, c. 39; 6 G. 4, c. 16, s. 108; *Archb. B. L.* 99; 5 B. & C. 392; 6 B. & C. 479. As to extents, see *Arch.* 122; 6 G. 4, c. 16, s. 71.

Where a bill of exchange was delivered by a bankrupt, with intent to transfer the property, more than two months before a commission issued, though not actually endorsed within the two months, it was holden to vest in the endorsee, and not in the assignees; 1 *Camp.* 432; and see *Esp. N. P.* 40; 2 J. & W. 237; 1 J. & W. 428. But, in a late case, it was held that a release executed by the bankrupt, after an act of bankruptcy to a releasee, knowing of the bankrupt's insolvency, is invalid, although executed more than two months before the suing out of the commission: *Mavor v. Pyne*, 3 *Bingh.* 285.

*Defence in Action to recover Money paid by the Bankrupt to Defendant, or by Defendant to Bankrupt, that it was paid without Notice.*] By the 82d sect. of the 6 G. 4, c. 16, all payments really and *bona-fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and all payments really

and *bona-fide* made, or which shall hereafter be made to any bankrupt, before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt, had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

*Defence in Action to recover Property delivered by Defendant to Bankrupt, after his Bankruptcy, that it was so delivered without Notice.]* By sect. 84 of the 6 G. 4, c. 16, no person, or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandises, or effects, belonging to any bankrupt shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order, provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

*Defence of Set-Off.]* By s. 50 of 6 G. 4, c. 16, "where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one [\*243] debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt, before the credit given to, or the debt contracted by him, and what shall appear due on either, on the balance of such account, and no more shall be claimed and paid on either side respectively; and every debt or demand thereby made provable against the estate of the bankrupt may also be set off in manner aforesaid, against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." This section has consolidated the provisions of the 5 G. 2, c. 30, s. 28, and the 46 G. 3, c. 135, s. 3, and also made these alterations:—1. The accounts may now be taken down to the date of the commission, and the credit need not be given two months previous, as by 46 G. 3, c. 135; *Southwood v. Taylor*, 1 B. & A. 471; *Kinder v. Butterworth*, 6 B. & C. 42. 2. That the party is to be affected only by proving that he had notice of an act of bankruptcy, and will not be affected by proof that he had notice that the bankrupt was insolvent, or had stopped payment. 3. That every debt or demand which may be proved, may also be set off against the bankrupt's estate; therefore, cases where the debt was contingent, which were formerly held not to be within the provision of the acts as to mutual credit, may now be proved under the 56th sect.: *ex. p. Groome*, 1 Atk. 115; *Hancock v. Entwistle*, 3 T. R. 435; 5 *ib.* 133; *ex. p. Whitaker*, 1 Rose, 301.

The term *mutual credit* has always received a very liberal construction, being more extensive than that of mutual debts, and has not been confined to mere pecuniary demands; *ex. p. Deeze*, 1 Atk. 228; but the credit given must be proved to be such as will in its nature terminate in a debt, *Rose v. Hart*, 8 Taunt. 499; "as, where a debt is due from one party, and credit given by him on the other, for a sum of money,

payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other, in such case, the credit given by the delivery of the property must, in its nature, terminate in a debt; the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with; but, where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute: *p. Gibbs, C. J., Rose v. Hart*, 8 Taunt. 506. A mutual credit may be created, though it were not the intention of the parties to trust each other, as if a bill of exchange, accepted by A., get into the hands of B., and B. buy goods of A., there is mutual credit between A. and B., though A. do not know that the bill is in B.'s hands; *Hankey v. Smith*, 3 T. R. 507, n. The right of set-off is incident to the right of lien at common law, limited, however, by the extent of the lien: thus, in the case of a *general* lien, as where a factor has a lien for his general balance, he will have a right to set off the whole of his debt due from the bankrupt; but one who has only a particular lien, as a miller or fuller, has no lien beyond the amount of his respective charges: *id.*

With respect to the *Nature of the Debt due by the Creditor to the Bankrupt's estate.*] It must be proved to have been due before the act of bankruptcy on which the commission is founded, though it is immaterial whether it were then payable or not. Thus, if the holder of an acceptance buy goods from the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods: *Hankey v. Smith*, 3 T. R. 507, n. So, if a trader, before an act of bankruptcy, give a security to his creditor for his debt, and that security become available either before or after bankruptcy, the creditor may set off the amount derived from the security against the debt due to \*him: *Olive v. Smith*, 5 Taunt. 56. And if a [\*244] trader, previous to an act of bankruptcy, send goods to a factor for sale, and draw bills upon him, on account of them, the factor may set-off the amount of the bills, when paid, against the proceeds of the goods, when sold by him: *Hammonds v. Barclay*, 2 East, 227. And where a person sold goods to a trader to the amount of £430, at six months' credit, and afterwards sold him another parcel to the amount of £230, at the same credit, at the expiration of the credit for the first parcel, the trader gave him bills upon other persons for £600, and he gave the trader an undertaking to repay him the balance £170, upon the bills being paid; the bills were paid, and the trader had become bankrupt before the credit for the second parcel expired, yet it was holden that the vendor of the goods could set off this £170 against the amount of the second parcel. *Atkinson v. Elliott*, 7 T. R. 378. But where a banker had accepted bills for a trader, after he committed an act of bankruptcy, but, before a commission sued out, lodged money in his hands for the payment of them, it was held under 5 G. 2, c. 30, that the assignees might recover this money from the banker, and that the banker was not entitled to set it off, although he had paid the bills: *Tamplin v. Diggens*, 2 Camp. 212; *Ridout v. Brough, Coop.* 139. However, under the new act, in such case, it must appear in evidence, that debt. had no

notice of the act of bankruptcy. And, if a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set off the payments against the receipts, as against the assignees: *Vernon v. Hankey*, 2 T. R. 113, 3 Bro. 313; *Raphael v. Birdwood*, 5 Price, 604; *ex p. Rhodes*, 15 Ves. 539.

With respect to the *Nature of the Debt* due from the *Bankrupt* to the *Creditor*.] This must be such as might be proved under the commission. Where a country banker became a bankrupt, and, at the time of his bankruptcy, he and another country banker in the same town held notes and other securities of each other, to nearly the same amount, immediately after the private meeting, after the banker was declared bankrupt, and a provisional assignee was appointed, the provisional assignee presented the notes of the other banker for payment, partly at the bank in the country, and partly at the house of his agent in London, and was paid: it was holden that the banker whose notes were so paid might recover the amount in an action for money had and received against the provisional assignee: *Edmeads v. Newman*, 2 D. & R. 568, 1 B. & C. 418; and see *ex p. Rawson*, 1 Jacob, 274. But the debtor of a bankrupt cannot set off a debt due from the bankrupt, if assigned to him after the bankruptcy. Therefore, it has been held under the old statutes, and would doubtless on the present one, that where the holder of a promissory note of a bankrupt endorsed it over after the issuing of the commission to a person who was debtor to the bankrupt's estate, in order that he might set it off in his settlement with the assignees, that he was not entitled to do so, even though he might have proved for the amount, *Marsh v. Chambers*, 2 Str. 1234; and debt. cannot set off cash notes of the bankrupt, payable to J. S., or bearer, without showing that they came to his hands before the bankruptcy, though they bear date before that time: *Dickson v. Evans*, 6 T. R. 57. And, even where such a transfer of a note of a bankrupt occurred before the issuing of the commission, but after both endorser and endorsee were apprized of his insolvency, it was holden that the endorsee could not set it off: *ex p. Stone*, 1 Glyn & J. 191. And, where a country banker became bankrupt, and a debtor to his estate, after the issuing of the commission, purchased a quantity of his bank notes, at the rate of 10s. in the pound, it was holden that he could not set them off in his settlement with the assignees: *Hodson v. Young*, E. 1814, cited *Arch. Bank.* 92. Where the set-off arises on the endorsement of a bill to the debt, he must give in evidence that the \*endorsement was made before the bankruptcy, *Lucas v. Marsh*, Barn. 453; but where the set-off was founded on certain notes of the bankrupt, proof that notes of the bankrupt, to the amount of the set-off, came to the debt.'s hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore v. Wright*, 2 Marsh. 209; 6 Taunt. 517, s. c. It is not sufficient, for the purpose of establishing a set-off, to prove that the debt.'s demand has been allowed by the commissioners as a debt: *Pirie v. Kemnet*, 3 Campb. 279.

In cases of a *trust* between two parties, where the object of the trust was the sale of goods, and one party was indebted to the other on another account, it has been held to be a subject of set-off. Thus, where three

persons joined in an adventure to buy and sell pearls, but the profit and loss were to be divided between the three, one of the parties becoming bankrupt, the party, (who was to sell the pearls) was allowed to set off a debt due to him from the bankrupt, in an action commenced against him by the assignees, against the third share of the pearls belonging to the bankrupt, although the pearls were not sold, nor the produce received, until after the bankruptcy: *French v. Fenn*, C. B. L. 536. So, also, where a principal entrusted his broker with a policy of insurance, to receive an average loss under it, and then became a bankrupt, and the broker afterwards received the average loss, he was allowed to set off several sums of money due to him from the bankrupt, for premiums, &c. against the amount he received upon the policy after the bankruptcy, for the average loss was held to be a debt due before the bankruptcy, though not ascertained till afterwards: *Whitehead v. Vaughan*, C. B. L. 566; *Parker v. Carter*, *ib.* 567. "And the general principle is, that wherever each party has trusted the other with the possession of value, the assignees of either party (in case of his bankruptcy) can only withdraw that value from the other on the terms of paying what is due between them: *p. Gibbs, C. J., Olive v. Smith*, 5 Taunt. 56.

Where the credit is not expired, as where a sum of money is payable at a future day after the bankruptcy, it is the subject of set-off, as within the meaning of the term mutual credit, *ex. p. Prescott*, 1 Atk. 230; as, where A. lent his acceptance to the bankrupts, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, and A. paid the amount after the commission issued, and before an action was brought against him by the assignees, for a debt owing by him to the bankrupt, it was holden that he was entitled to set off the amount of such payment under the words "mutual credit." *Smith v. Hodson*, 4 T. R. 211; *ex. p. Boyle*, C. B. L. 542; *ex. p. Wagstaff*, 13 Ves. 65.

The debt, to be the subject of a set-off, must be due in the same right. Thus, the costs of a judgment, as in case of a non-suit against plt. after he has become bankrupt, cannot be set off against the costs of an action by his assignees, though the debt be the same in both actions, there being no mutual credit between the debt. and the assignees, nor the parties in the two actions the same: *West v. Price*, Bing. 455. And so, where three partners, A., B., and C., delivered bills to D. for a special purpose, and A. and B. became bankrupts, and their assignees, together with C., the solvent partner, brought an action against D. for the proceeds of the bills, it was held he could not set off a debt due to him from A., B., C.: *Staniforth v. Fellowes*, 1 Marsh. 184; *Thomason v. Frere*, 10 East, 418. And, where a party holding the acceptance of a trader in bad circumstances, agreed with debts., that he should endorse the bill to them, and that they, as a mode of covering the acceptance, should purchase goods of the trader, to be paid for by a bill after the time of the trader's acceptance becoming due, the trader not being aware that debts. held his acceptance, \*the trader having become bankrupt, and, [\*246] on an action brought by the assignees to recover the value of the goods sold, it was held that debts. could not set off the bankrupt's ac-



ceptance, they not being the real *bona-fide* holders of the bill, but merely trustees, and, as such, could not set off a demand made upon them in their own right: *Fair v. M'Iver*, 16 *East*, 130. In an action by the assignees of an army-agent, against the colonel of a regiment, for goods sold and delivered by the agent for the use of the regiment, it was held that the colonel, who had given authority, by warrant to the agent, to receive moneys from the paymaster, might set off a sum remaining unaccounted for in the hands of the agent, in reduction of the demand: *Knowles v. Maitland*, 4 *B. & C.* 173; 6 *D. & R.* 312, *s. c.*

### *Competency of Witnesses.*

*Bankrupt.]* The bankrupt is not a competent witness in an action by his assignees, either for the purpose of proving property in himself, or a debt due to himself, or in any other manner to increase the fund, as the amount of his allowance under the commission given by the act depends upon the amount of his estate, and as he is also entitled to the surplus when all his creditors are paid: *Ewens v. Gold*, *B. N. P.* 43; *Butler v. Cooke*, *Cowp.* 70; *ex. p. Bent*, 1 *Madd.* 46. His competency may however, be restored, by his releasing to his assignees his claim to the surplus, and to his allowance, provided he has obtained his certificate: *Nares v. Saxby*, cited 2 *T. R.* 497. And, though he have not obtained his certificate, he may also be a witness against his assignees, in questions respecting his property: as, if his assignees sued a person on a bond made to the bankrupt before his bankruptcy, he may be called by the debt. to prove it paid; as, by disproving a debt due to his estate, he diminishes the fund from which his allowance is derived: *Butler v. Cooke*, *Cowp.* 70, *B. N. P.* 73. But a bankrupt is not a competent witness to support the commission, and no release will make him so, *Field v. Curtis*, 2 *Str.* 829; for, if the commission be not good, the certificate and all the proceedings are void, and the bankrupt would be then liable again to his debts, from which the certificate, if valid, would discharge him; he is, therefore, incompetent to prove his own act of bankruptcy, or even to explain an equivocal act, or to prove the petitioning creditor's debt, *Chapman v. Gardner*, 2 *H. Bl.* 279, *Cross v. Fox*, *ib.*, *Flower v. Herbert*, *ib.*, *Hoffman v. Pitt*, 5 *Esp. Rep.* 22, *Rabitt v. Gurney*, *Mont.* 482, *n.*; and the cases of *Oxlade v. Perchard*, *Russell v. Russell*, are overruled. Nor can he be examined to any act of bankruptcy committed by him prior to that on which the commission is founded: *Wyatt v. Wilkinson*, 5 *Esp. Rep.* 187. Nor can he be cross-examined to defeat the commission, or any other similar evidence: *Binns v. Tetby*, *M'C. & Y.* 397; *Elsom v. Brailey*, 1 *Sel. N. P.* 239. The incompetency of a witness to support the commission is restricted to evidence, either affirming or disaffirming the bankruptcy, *p. Id. Ellenb.* 1 *Stark.* 134; for, after obtaining his certificate, and executing a release, he is a competent witness to prove the signature of the commissioners, in order to identify the proceedings under the commission, as its validity does not depend on their signature, but on the facts contained in the depositions: *Morgan v. Prior*, 2 *B. & C.* 14; 3 *Stark.* 58. See also *Brind v. Bacon*, 5 *Taunt.* 183; *Reed v. James*, 1 *Stark.* 134.

The bankrupt may be a witness in an action *qui tam* brought by his assignees against the person who has won money from the bankrupt at play, after the act of bankruptcy committed: three releases, however, are necessary: 1. his own release of the allowance and surplus under his commission; 2. a release from all his creditors to him of their respective debts; 3. a release from the assignees to him: *Carter v. Abbott*, 1 B. & C. 444; 2 D. & R. 575.

\*Where the witness has become a bankrupt a second time, his certificate under the second commission, and a release to the [247] assignees, will not make him a competent witness to increase the fund, unless he has paid 15s. in the pound under the second commission, as unless he pays that dividend, his future effects remain liable: *Kennet v. Greenwallers*, Pea. Rep. 3. It has been held that, in a suit against the crown, a release from the bankrupt to his assignees will not render him a competent witness, the crown not being bound by the bankrupt law: *Crauford v. Attorney Gen.* 7 Price, 2.

The wife of the bankrupt is equally incompetent to support the commission, as the bankrupt himself. And the power which is given to the commissioners by the 37th section of the new act, to examine the wife as to the discovery of the bankrupt's property, is limited to that express purpose, and to the commissioners alone, and does not extend to render a competent witness for any other purposes, or before any other tribunal. And see 2 *Phill. Ev.* 284. Where the wife was called to prove that a promissory note had been paid to the debts. in contemplation of bankruptcy, Lord Kenyon held her to be a competent witness, inasmuch as, if the plt. recovered, the debts. would be creditors against the estate to the amount of the note; and so the witness stood indifferent: *Jourdain v. Lefevre*, 1 *Esp. Rep.* 66.

*Creditor.*] A creditor is not, in any case, a competent witness to sustain a commission; for, by so doing, he increases the fund out of which he is to receive a dividend, *Shettleworth v. Bravo*, Str. 507; but he is a competent witness if he release the assignees, though he give no release to the bankrupt, *Ambrose v. Clendon*, C. Temp. Hard. 267, *Koope v. Chapman*, Pea. Rep. 19; and a release given to one of the assignees, in consideration of his promising to pay what may be justly due, will remove his incompetency: *Sinclair v. Stevenson*, 1 C. & P. 582. A creditor will also be rendered a competent witness, by his selling, or agreeing to sell, his debt, *Granger v. Furlong*, Bl. R. 1273, *Heath v. Hall*, 4 Taunt. 326; though, at one time, it was held, that if the creditor had not proved under the commission, he was competent to support it, though not to increase the fund, *Williams v. Stevens*, 2 Camp. 301; but this distinction has been overruled by the cases of *Adams v. Malkin*, 3 Camp. 543, and *Crooke v. Edwards*, 2 Stark. 302, where the creditor who had not proved was still considered incompetent to sustain the commission, it being a benefit to him, as bringing a divisible fund within his reach, and empowering him to enlarge his means of satisfaction. A creditor is, however, a competent witness to disprove the petitioning creditor's debt. *In re Codd*, 2 Scho. & Lef. 116.

*Petitioning Creditor.*] A petitioning creditor, even by a release or

sale of debt, will not be rendered a competent witness to support the commission, "as he had a clear and direct interest in the question at issue, in consequence of his entering into the bond conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed," *p. Ld. Ellenb., Green v. Jones, 2 Camp. 412*; though, to overthrow the commission, his evidence will be allowed, *ib.*; as, by showing that the act of bankruptcy was conclusive: *Lloyd v. Stretton, 1 Stark. 40.*

*Commissioner and Assignee.*] It has been held that a commissioner may be examined as a witness to support the commission, on the ground that he could not be compelled to refund the fees which he had received: *Crooke v. Edwards, 2 Stark. 302.* An assignee, who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt; for he is then a mere trustee, whose trust is \*coupled with no personal interest: *Tomlinson v. Wilkes, 2 B. & B. 397; 5 Moo. 175.*

*Admissibility in Evidence of Bankrupt's Admissions.*] These, when made *before his bankruptcy*, as to the existence of the petitioning creditor's debt, are receivable in evidence as an admission of the debt, as the bankrupt then had no interest to make such admission; therefore, the same objections do apply to this evidence as to that given after his bankruptcy, in support of the commission. The bankrupt may, therefore, allow his attorney (employed by him before his bankruptcy) to give in evidence privileged communications then made, though offered in proof of the act of bankruptcy: *Merle v. More, 1 Ry. & M. 390.* As to the admission of the declarations of a bankrupt relative to past transactions, the general rule is, that they ought not to be received to explain any past transaction, which at the time of making the declaration was completely finished, *Robson v. Kemp, 4 Esp. Rep. 233*; for to admit such declarations would be, in effect, to receive an admission by the bankrupt, that he had committed an act of bankruptcy, *2 Phil. Evi. 287*; but a letter of the bankrupt, written previous to his bankruptcy, and nearly contemporaneous with the act done by him, is admissible in evidence, to explain the motives of the act. And, in a very recent case at *nisi prius* (which was an action brought by the assignees to recover back money paid to a debt., on the ground of a fraudulent preference), *Ld. Chief J. Best* acted up to the full extent of this principle, by admitting a letter of the bankrupt in evidence (though written five months before the commission issued, explaining the embarrassed state of his affairs), in order to show that, when the bankrupt made the particular payment in question to the debt., he had his bankruptcy then in contemplation: *Bacon v. Maine, cited Deacon, 798*; and see *ante, 53.*

*Admissibility in Evidence of Depositions, and the Proceedings under the Commission.*] Previous to 5 G. 2, c. 20, s. 41, the depositions of witnesses taken before the commissioners, could not be given in evidence in an action to try the question of bankruptcy, or any other question connected with it, as the parties had no power of cross-examination in those proceedings: *Francisco v. Gilmore, 1 B. & P. 177.* That act made a copy of the proceedings evidence in certain cases, after being entered of record, 49 G. 3, c. 121; sec. 10, 11, made also the deposi-

tions and proceedings themselves evidence to prove the petitioning creditor's debt, the trading, and the act of bankruptcy; the 92d sect. of the recent act extends the admissibility of the depositions for this purpose, in actions brought by the assignees, for any debt or demand of the bankrupt. When the depositions have been recorded according to the statute, and the witnesses to prove the facts deposed to are dead, it would seem that the depositions would then be admissible as evidence of the facts contained in them, even against the bankrupt: *Deacon*, 788. The examination of the bankrupt taken before the commissioners, is admissible as evidence against himself, even though the questions were improperly put to him, with a view to the action, *Stockfleth v. De Tastet*, 4 *Camp.* 10; or though they exposed him to penalties, *Smith v. Beadnell*, 1 *Campb.* 40. And the examination of any party is evidence against himself, if he has signed it after he has read it, *Hammond v. Myers*, 3 *Atk.* 415; and it is admissible, though not taken down word for word, but only the substance of what appeared to be relevant: *Milward v. Forbes*, 4 *Esp. Rep.* 172. If the party refer in his examination to written documents, they may be read as part of examination, *Falconer v. Hanson*, 1 *Camp.* 171; but parol evidence is admissible to explain it: *Wilson v. Poulter*, 2 *Str.* 794. The examination of a third person, however, has been held to be inadmissible against a party to the suit: 3 *Atk.* 415. And, where a creditor has taken the bankrupt's goods in execution, after an act of bankruptcy, and assigned them to B., the creditor's examination, taken under the commission, was [\*249] holden not admissible, in an action by the assignees against B.: *Deady v. Harrison*, 1 *Stark.* 60. The examination of a bankrupt under another commission, is not (in event of his death) evidence upon a petition in his bankruptcy to expunge the debt of a creditor: *ex. p. Campbell*, 2 *Rose*, 51. Where debt. pleaded a set-off in an action brought against him by assignees, his own deposition in proof of a debt before the commissioners was held inadmissible: *Pirie v. Mennett*, 3 *Camp.* 279. Those depositions only which are read in support of the party's case upon the trial, are to be considered as given in evidence, and the opposite party has no right to inspect any other depositions for the purpose of cross-examining a witness; but he may afterwards call for the deposition of the witness, and read it in evidence, for the purpose of contradicting him: *Black v. Thorne*, 4 *Camp.* 191; *Stafford v. Clarke*, 1 *Carr.* 26; see *ante*, 42. As the proceedings are kept for the benefit of the creditors, there is no general right given to inspect them as public documents. Before they are received in evidence, it must be shown that they came out of the proper custody, namely, that of the solicitor to the commission; otherwise the handwriting of one of the commissioners who took them must be proved.

It is now established, that the solicitor to the commission is bound to produce the proceedings, when served with a *subpœna duces tecum*; *Cohen v. Templar*, 2 *Stark.* 260, *Corsen v. Dubois*, *Holt*, C. 239, 5 *Esp. Rep.* 91, though it was formerly doubted, *Bateson v. Hartsink*, 4 *Esp. Rep.* 43; but the court will exercise its discretion, and intercept the production of them, if likely to be prejudicial to the interest of his clients, the assignees: *Eden*, 373. But, though the solicitor may be

bound to produce the proceedings and books of the bankrupt, the evidence must be confined to entries relative to the matters in issue: *R. & M.* 64. It has been held, that the solicitor is not bound to produce them in a collateral action, to which neither the assignees nor the bankrupt were parties, and where the production might tend to the detriment of the assignees: *Laing v. Barclay*, 3 *Stark.* 38.

## II. ACTIONS AGAINST ASSIGNEES.

### *Form of Remedy and Pleadings.*

These will be the same as in ordinary cases, the assignees of a bankrupt never being liable *as* assignees. In actions against assignees, for any thing done in pursuance of the 6 *G.* 4, c. 16, by the 44th section of that act, the debts may plead the general issue, and give the special matter in evidence. The action must be commenced against them within three calendar months after the fact complained of was committed; but it is not necessary that they should plead this limitation; if it appear, at the trial, that the action was commenced after the time thus limited, the jury shall find a verdict for debt: *ib.*

### *Evidence for Plaintiff.*

This will be the same as in ordinary cases; the assignees are not personally liable to be sued by any creditor, even in respect of effects in their hands, as he must prove his debt, and accept the dividend payable to him. They cannot be sued for the dividend: 6 *G.* 4, c. 16, s. 111; see 1 *G. & J.* 345. They cannot be sued, *as such*, for goods sold to them, 1 *Coup.* 134-5; nor can they be sued for fees due to the messenger before the choice of assignees, *Burwood v. Felton*, 3 *B. & C.* 43. As to their liability for attorney's costs, *ante*, 158. And if they do not take possession of the bankrupt's estate, they will not be liable to the performance of covenants, 7 *East*, 335; as to what amounts to such [\*250] taking possession, see *post*, "Covenant," "Landlord and Tenant." They are not liable to the bankrupt for his allowance, unless he obtains his certificate before the payment of the dividends: 1 *Esp. Rep.* 396; 6 *T. R.* 546. When an assignee is removed, and he has assigned his interest to his co-assignees, he may be sued by them, *Peake's Rep.* 213; and assignees who personally contract, 4 *Taunt.* 754, or receive money for the use of another, 1 *M. & S.* 714, may be sued on their own personal responsibility, though not in the character of assignees. Where the bankrupt, as the agent of the assignees, is permitted to carry on the business for the benefit of the creditors, and not on his own account, the assignees are liable for goods supplied for the purposes of the business, even although the credit were given in the bankrupt's own name: *Kinder v. Howarth*, 2 *Stark.* 354; and see 1 *Atk.* 86, 90; *Ambl.* 218; 1 *Kenyon's Rep.* 38. The assignees are liable to the commissioners upon their covenant for indemnity contained in the assignment; and, if the commissioners be damaged contrary to the terms and meaning of the covenant, the court will not restrain them

from bringing an action on it: 16 *Ves.* 234. It need hardly be noticed, that if the assignees seize or retain property which does not pass to them under the assignment, they will be personally liable, and the owner of it may maintain an action against them in respect of it. As to proof of commencement of action, *ante*, 162.

### *Evidence for Defendant.*

On the part of the defendants, if they justify as assignees, the petitioning creditor's debt, the trading, the act of bankruptcy, the commission, and assignment, must be proved, as well as the special matter of defence. We have, however, already seen when strict proof of the above first three requisites of a commission may be dispensed with, from the want of a notice disputing them, &c., *ante*, 206 to 208; also, the nature and mode of such proof: *ante*, 208 to 240. Those observations will be here applicable as to proof of the commission and assignment: *ante*, 208-9. As to proof of commencement of action, *ante*, 162.

## III. ACTIONS BY BANKRUPT.

### *Form of Remedy and Pleadings.*

These will be the same as in ordinary cases. The plt.'s bankruptcy may be given in evidence under the general issue: 7 *T. R.* 396; *B. N. P.* 153; 15 *East*, 622; 3 *Camp.* 236.

### *Evidence for Plaintiff.*

The proof of the cause of action will be the same as in ordinary cases. Plt. should be prepared with evidence to rebut the deft.'s evidence against plt.'s title to sue; upon which head it should be observed, that if he have not obtained his certificate, his after-acquired property may, no doubt, be claimed by his assignees, *ante*, 236; but although uncertificated, he may maintain an action for his personal labour performed since the issuing the commission, *Chippendale v. Tomlinson*, *Cook*, 428, 1 *Esp. Rep.* 140; or with relation to his after-acquired property, *Webb v. Fox*, 7 *T. R.* 391, *Fowler v. Down*, 1 *B. & P.* 44, 1 *Esp. Rep.* 170, *Peake's Rep.* 140; or sue upon any contract made with him, *Cuming v. Roebuck*, *Holt*, C. 172, *Drayton v. Dale*, 2 *B. & C.* 293, 3 *D. & R.* 534, if the assignees do not interfere: *Kitchen v. Bartsch*, 7 *East*, 53. "The assignees have vested in them a right to interfere and claim the property; and, if they do make any claim, it is effectual against the bankrupt and all the world: but, if they do not interfere, then, as between the bankrupt (or one claiming under him) and \*his [\*251] debtor, the latter cannot set up their title, but the bankrupt has a right, in a court of law, to enforce the payment of his debt:" *p. Abbott, C. J., Drayton v. Dale*, 298. Even where the assignees of a bankrupt employed him in carrying on the manufacture for the benefit of the creditors, and paid him money from time to time, this was holden evidence of such a contract between him and his assignees, as would enable him to recover from them a reasonable compensation for his work

and labour: *Cole v. Barrow*, 4 Taunt. 774. The bankrupt may bring an action against any person who has seized his goods or taken possession of his house, &c. under the commission, or against them by whose direction it has been done, in order to try the validity of the commission, *Bryant v. Withers*, 2 M. & S. 123, 131, 9 East, 21; as to when he is precluded contesting his commission, *ante*, 207, and as to what steps he must take to contest it, *ante*, 207.

### *Evidence for Defendant.*

This will consist in disproving plt.'s title to sue, by showing the assignees have interfered, &c., *supra*; or the cause of action.

## IV. ACTIONS AGAINST BANKRUPT.

### *Form of Remedy and Pleadings.*

These will be the same as in ordinary cases, with the exception of the plea, that the defendant is discharged from liability by his certificate, and with respect to which, by the 6 G. 4, c. 16, s. 126, he may "plead in general that the cause of action accrued before he became a bankrupt, and may give this act and the special matter in evidence;" as to which evidence, and what causes are barred by the certificate, see *post*, 254. The certificate cannot be given in evidence under the general issue, 1 Camp. 363, 12 East, 664; but the deft. may plead the general issue as well as any other plea. This general plea of bankruptcy given, allowed by the above act, can be pleaded only in cases where the act of bankruptcy took place before the suit was commenced, 6 East, 413, 4 T. R. 516, 5 Esp. Rep. 90, and the certificate was obtained before plea pleaded, 9 East, 82. Where both the bankruptcy and certificate are after action brought, the plea must be special; so, where a surety brings an action for money paid by him after the issuing of the commission, the plea must be special, *Stedman v. Martremant*, 12 East, 664; so, if the cause of action be barred by the certificate, but the certificate be not obtained until after plea pleaded, it must be pleaded specially *puis darrein continuance*, showing the allowance of the certificate by the chancellor, 6 T. R. 605-7; and, if deft. neglects to plead it, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment: 6 B. & C. 105.

As to the *form* of the *general* plea, it is not necessary to aver that the deft. became a bankrupt before the commencement of the action: 6 East, 413, *supra*. It is necessary to show, that the causes of action accrued before the deft. became a bankrupt, and this even though the cause of action was not actually completed before the act of bankruptcy: 4 T. R. 156; 5 B. & A. 17. This plea should conclude to the country: 1 P. Wms. 258; 10 Mod. 160, 247. In the *special* plea of bankruptcy, all the proceedings should be set forth: 1 B. & P. 448. The usual allegation in this special plea, that the commission issued out of the Court of Chancery, is incorrect: 3 Camp. 58. In a special plea of bankruptcy,

&c., after action brought, the prayer against the plt.'s right *further* to maintain his action is necessary: 6 *T. R.* 597.

With respect to the *replication*, the usual *similiter* is proper to the general plea of bankruptcy; a special replication would be bad, on special demurrer: \**Wilson v. Kemp*, 2 *M. & S.* 549, 3 *Camp.* [\*252] 499, n. (a.) s. c.; *Hughes v. Morley*, 1 *B. & A.* 22. Under this *similiter*, any acts rendering the certificate void or inoperative may be given in evidence. To the special plea of bankruptcy, the replication must be special, and how to reply: 3 *Taunt.* 287.

### Precedents.

#### PLEA OF BANKRUPTCY OF DEFT. TO ACTION OF ASSUMPSIT.

(*Actio non, as usual, post, "Plea."*) Because he says, that after the making of the said several supposed promises and undertakings in the said declaration mentioned, if any such were made (or, "after the occurring of the said several supposed causes of action in the said declaration mentioned, if any such ever occurred"), to wit, on, &c. (*day of act of bankruptcy, or about the time*), he, the said deft., became a bankrupt, within the true intent and meaning of the statute in force concerning bankrupts, to wit, at, &c. (*venue*), aforesaid; and that the said supposed causes of action in the said declaration mentioned, if any such there were or be, and each of them, did accrue to the said plt. before he, the said deft., so became a bankrupt, as aforesaid, to wit, at, &c., aforesaid; and of this he, the said deft., puts himself upon the country, &c.

#### PLEA OF BANKRUPTCY OF DEFT. WHERE THE CERTIFICATE WAS OBTAINED AFTER THE COMMENCEMENT OF THE SUIT.

(*First plea, general issue; secondly.*) And, for a further plea, in this behalf, the said deft., by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plt. ought not *further* (*necessary, ante, 201*) to have or maintain his aforesaid action thereof against him, the said deft.; because he says, that the said deft., before and on (*day of bankruptcy, or about that time*), and from thence continually, until the suing out the commission of bankrupt hereinafter mentioned, was a (*the trade carried on by him*), and during all that time did use and exercise the trade of a (*state it as before*), by way of bargaining, exchanging, bartering, and chevesance, and sought his trade of living by buying and selling, to wit, at, &c. (*venue*), aforesaid; and the said deft., so using and exercising the trade of a (*trade as before*), and seeking his trade of living as aforesaid, afterwards, to wit, on, &c. (*petitioning creditor's debt when due, or date of affidavit*), at, &c., aforesaid, he, the said deft. became and was indebted to one C. D. (*petitioning creditor*), a subject of this realm; in the sum of (*sum sworn to*), of lawful money of Great Britain, for a true and just debt due and accruing from the said deft. to the said C. D.; and the said deft. was then and there also indebted to divers other persons in divers other large sums of money; and the said deft. being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a (*trade as before*), and seeking his trade of living as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at, &c., aforesaid, the said debt to the said C. D., and the said other debts, being then, and there due, and unpaid, and unsatisfied, became and was a bankrupt, within the true intent and meaning of the several statutes then and still in force concerning bankrupts, made and provided, some or one of them; and that thereupon, afterwards, to wit, on, &c. (*date of commission*), at, &c. aforesaid, a certain commission of bankruptcy, under the great seal of the united kingdom of Great Britain and Ireland, bearing date at Westminster, the same day and year last aforesaid, grounded upon the said several statutes, some or one of them, upon the petition of the said C. D., was duly awarded and issued against the said deft., directed to certain commissioners therein named, to wit, E. F., G. H., I. K., L. M., and N. O.; by which said commission our lord the king did name, assign, and appoint, constitute and ordain, them, the said E. F., G. H., &c. &c., his special commissioners, thereby giving full power and authority to the said commissioners, four or three of them (if a country commission, here say, *the said E. F. or G. H. to be one*), to proceed according to the statute in the said commission specified, not only concerning the said bankrupt, his body, lands, tenements, freehold and customary goods, debts, and other things whatsoever, but also concerning all other persons who, by concealment, \*claim, or otherwise did or should offend touching the premises in the said commission specified, or any part thereof, contrary to the true intent and meaning of the same statute; and our said lord the



king did thereby command the said E. F., G. H., &c., to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors of the said deft., the bankrupt aforesaid, as towards and for all other intents and purposes, according to the ordinances and provisions of the same statute. And our said lord the king, by the said commission, commanded the said E. F., G. H., &c., or any four or three of them, to proceed to the execution and accomplishment of the said commission, according to the true intent and meaning of the statute, with all diligence and effect; as in and by the said commission, relation being thereunto had, will more fully appear; by virtue of which said commission, and by force of the said statute concerning bankrupts, the said E. F., G. H., and I. K., the major part of the said commissioners named in the said commission (having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the said statute, and having then and there entered and kept a memorandum thereof among the proceedings in the said commission, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid), did, in due form of law, find that the said deft. had become a bankrupt, within the true intent and meaning of the statute in force concerning bankrupts, before the date and issuing forth of the said commission, and did then and there declare and adjudge him to be a bankrupt accordingly. And the said deft. further saith, that afterwards, to wit, on, &c. (*day of notice in Gazette*), at, &c., aforesaid, due notice was given and published in the London Gazette, that such commission of bankruptcy had been and was awarded and issued forth against the said deft., and that he had been declared a bankrupt thereon, and required to surrender himself. And the said deft. further saith, that the several meetings were duly appointed for his surrendering himself, and making a full disclosure and discovery of his estate and effects, and finishing his examination under the said commission, according to the form of the said statute; and that he, the said deft., duly surrendered himself to the major part of the said commissioners, in and by the said commission named and authorized, and submitted himself to be from time to time examined, touching the disclosure and discovery of his estate and effects, and at the last of the said meetings, to wit, on, &c., at, &c., aforesaid, finished his examination upon oath before the said commissioners; and, upon such his examination, then and there made a full disclosure and discovery of his estate and effects. And the said deft. further saith, that he hath always from the time of issuing forth the said commission, hitherto, to wit, at, &c., aforesaid, in all things conformed himself to the said act of parliament in force concerning bankrupts. And the said deft. further saith, that he, the said deft., afterwards, to wit, on, &c. (*date of certificate*), at, &c. aforesaid, duly obtained his certificate of conformity under the said commission, according to the said statute in force concerning bankrupts; and which said certificate afterwards and before — next after —, in this same term, to wit, on, &c. (*date of allowance*), at, &c., aforesaid, was duly allowed and confirmed by —, then and there being Lord High Chancellor of Great Britain, according to the form of the statute in that case made and provided. And the said deft. further saith, that the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue, to the said plt. before he, the said deft., so became a bankrupt as aforesaid, to wit, at, &c., aforesaid; and this he, the said deft., is ready to verify. Wherefore he prays judgment if the said plt. ought further to maintain his aforesaid action thereof against him, the said deft., &c.

See other precedents of plea of bankruptcy in Ireland, 2 *H. Bl.* 554; in America, 5 *East*, 124; that plt. proved his debt under the deft.'s commission, 5 *B. & A.* 95, 3 *Chil. Pl.* 917; plea of deft.'s bankruptcy in debt on simple contract, *ib.*, 956; the like in covenant, *ib.*, 1021; the like in covenant on \*a lease; *ib.*, 1020; the like *puis darrein continuance*, *ib.* 1243; replication of deft.'s promise after bankruptcy, *ib.*, 1148; replication denying plt.'s claim to come in under the commission, *ib.*, 1418.

### *Evidence for Defendant.*

*Certificate.*—*Its effects against Action brought against Bankrupt.*—By the 6 *G. 4*, c. 16, s. 131, “every bankrupt who shall have duly surrendered, and, in all things, conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made provable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed, *ib.*, s. 122-3; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of

his bankruptcy, or who was then jointly bound, or had made any joint contract, with such bankrupt." As to when the certificate will be void, and what is an answer to it, see *post*, 255-6.

Under this provision, the effect of the certificate will be to bar all demands which were due at the time of the act of bankruptcy, and which could have been proved under the commission: *Bamford v. Burrell*, 2 B. & P. 11; and, as to what may be proved, see *Arch.* 107, *Deacon*. A debt is not discharged which occurred after the bankruptcy, but before the commission: 2 B. & P. 11. Where a bankrupt acceptor pleaded his certificate, and it appeared that the commission was sued out after the day of the date of the bill, but before it became due, it was held to be incumbent on the plt., an endorsee, to show that an act of bankruptcy was committed before the date of the bill, *Pearson v. Fletcher*, 5 Esp. Rep. 90; but an antecedent act of bankruptcy may, in such case, be proved by the proceedings under the commission, stating a previous act of bankruptcy, *ib.* Where a verdict is obtained against the bankrupt, in an action for damages, before an act of bankruptcy, but judgment is not signed till after, the debt will not be barred by the certificate: *Bass v. Gilbert*, 2 M. & S. 70. If an action be commenced against a bankrupt after the bankruptcy for a debt due before, and, after a verdict for the plt., the bankrupt obtain his certificate, the costs of the action, as well as the debt, are provable under the commission, *Willet v. Pringle*, 2 N. R. 190, *Scott v. Ambrose*, 3 M. & S. 328; for the costs bear relation to the original debt: *ib.*, 2 Stark. Ev. 203.

What is a discharge of a debt in the country where it was contracted, is a discharge of it every where: *p. Ld. Ellenb., Potter v. Brown*, 5 East, 129, recognizing *Ballantine v. Golding*, Cook, 487; see also *Hunter v. Potts*, 4 T. R. 182. So, the certificate is a bar to an action for debts contracted in England, as well as for those contracted in Scotland, *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462, or those contracted in Ireland, or any foreign country, *Odwin v. Forbes*, Buck. 57; and a certificate obtained under a commission of bankruptcy issued in Ireland, or any foreign country, will be a good defence to an action brought here for a debt contracted in Ireland, or any foreign country, *Potter v. Brown*, 5 East, 124; but it will not bar an action for a debt contracted here, *Smith v. Buchanan*, 1 East, 6, *Quin v. Keefe*, 2 H. Bla. 553; nor will a certificate under an English commission defeat an action for a debt contracted in the West Indies, *Beawes*, 543, Co. B. 465, or in Scotland, *Watson v. Renton*, 2 Bell's Com. 693. And, where a bill of exchange was drawn in Ireland, but accepted and paid here, it was considered an English debt, and, as such, not barred by the certificate under an Irish commission: *Lewis v. Owen*, 4 B. & A. 654.

\*The certificate is no bar where the action is for unliquidated damages; as, an action for trover, even in cases where the plt. [\*255] has his option to bring trover or assumpsit, *Parker v. Norton*, 6 T. R. 695, 3 Mad. 51; or an action of trespass for mesne profits, *Goodtitle v. North*, 2 Doug. 584. Bankruptcy is not a discharge of a promise to allow a weekly sum for the support of an illegitimate child; for, though the certificate would discharge any arrears accrued before the bankruptcy, yet, no proof in respect of the subsequent arrears could

have been admitted under the commission for them: *Millen v. Whittenbury*, 1 *Camp*. 429. A certificate under a joint commission will be evidence in bar of a separate debt, *Horsey's case*, 3 *P. Wms.* 23, *Howard v. Poole*, *Str.* 995; and, *vice versa*, a certificate under a separate commission in bar of a joint debt: *ex. p. Yale*, 3 *P. Wms.* 24. Signing the certificate of a surviving partner does not release the estate of a deceased partner: 1 *Meriv.* 570.

With respect to the *mode of proving* the certificate, the 120th section of the 6th *G. 4*, c. 16, enacts, that any bankrupt, who shall, after his certificate shall have been allowed, be arrested, or have an action brought against him for any debt, claim, or demand, hereby made provable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate. The certificate must be entered of record, as directed, *ante*, before it can be given in evidence: see 3 *Bing.* 493. The allowance need not be proved; it will suffice merely to produce it, the judges taking cognizance judicially of the chancellor's handwriting: *Eden*, 426. If B. plead his bankruptcy and certificate, and prove a commission against A., and a certificate under it, he may prove that he was formerly known by the name of A., and that the commission was issued against him, although at the time of the trial he was known by the name of B. only, *Stevens v. Elisee*, 3 *Camp.* 256. It must appear at the trial, that the bankruptcy was subsequent to the commencement of the action, see *ante*, 251; and, as to when the bankruptcy and certificate must be pleaded specially, *ante*, 251.

### *Evidence for Plaintiff.*

*Proof to defeat Certificate.*] By the 6th *G. 4*, c. 16, s. 127, it is enacted, "That if any person, who shall have been so discharged by by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by an insolvent act, shall be or become bankrupt, and have obtained, or shall hereafter obtain, such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children), shall vest in the assignees under the said commission, who shall be entitled to seize the same, in like manner as they might have seized the property of which such a bankrupt was possessed at the issuing the commission. Under this provision the certificate is avoided, though the former commission has been superseded: 1 *Doug.* 46. It has been held, that a deed of composition, embracing all the creditors, under which many of them came in, though some of them did not, is, in case of a subsequent commission of bankruptcy, such a com-

pounding with his creditors as will, within 5 G. 2, c. 30, s. 9, &c., deprive the bankrupt of the benefit of his certificate to protect his future effects from being liable to be taken in execution, *Slaughter v. Cheyne & Bryant*, 1 M. & S. 182; or though the \*former [\*256] commission have been superseded: *ex. p. Hodgkinson*, 19 Ves. 291; *Philpot v. Corden*, 5 T. R. 287. But a composition with a certain class of creditors, as, for instance, with joint creditors only, *Norton v. Shakspeare*, 15 East, 619; or a composition with all his creditors generally, if he have afterwards paid them 20s. in the pound, before his bankruptcy, *Read v. Sowerby*, 1 M. & S. 78, will not deprive a bankrupt of his certificate. For the purpose of proving a former commission, it is only necessary to produce the commission and proceedings, and prove that the debt submitted to it, without proving the leading act of bankruptcy, &c., *Heviland v. Cook*, 5 T. R. 655, *Gregory v. Merton*, 3 Esp. Rep. 195; and the certificate under such former commission must be proved, either by producing it, or by secondary evidence of it after notice to the bankrupt to produce it: *Graham v. Grill*, 4 Camp. 282; *Henry v. Leigh*, 3 Camp. 499. It is incumbent on the bankrupt to prove that he has paid 15s. under his second commission, *Gregory v. Merton*, 3 Esp. Rep. 195; and proof that it will, probably, produce so much, is insufficient: *Coverley v. Morley*, 16 East, 225; *Jelfs v. Bolland*, 1 B. & P. 467.

By the 130th section of the 6 G. 4, c. 16, it is enacted, that no bankrupt shall be entitled to his certificate, or to be paid any such allowance, and that any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day, £20, or within one year next preceding his bankruptcy, £200; or if he shall, within one year next preceding his bankruptcy, have lost £200 by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered, in pursuance of such contract, or shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, mutilated, altered, or falsified, any of his books, papers, writings, or securities, or made, or been privy to the making, of any false or fraudulent entries in any book, of the account or other document, with intent to defraud his creditors, or shall have concealed property to the value of £10 or upwards, or if any person, having proved a false debt under the commission, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees, within one month after such knowledge.

With respect to the effect of a *subsequent promise* by bankrupt, the 6th G. 4, c. 16, s. 131, enacts that no bankrupt, after his certificate shall have been allowed, under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement, be made in writing, signed by the bank-

rupt, or by some person thereto lawfully authorized in writing, by such bankrupt.

Besides the above legislative enactments, the plt. may, in answer to the certificate, show that it was obtained unfairly and by fraud, or that it is in other respects void; as if the bankrupt, or any person for him, give money or security for money to a creditor for signing the certificate, such certificate will be void: *Holland v. Palmer*, 1 B. & P. 95; 1 Doug. 228. Where the fourth, among several other signatures to a certificate, was obtained by a promise of the bankrupt to pay the creditor his whole debt, it was held this avoided the certificate, although the creditors who signed before and after the fourth were sufficient in number and value, without reckoning that one, for his example might have induced others to sign it: *Phillips v. Dicas*, 15 East, 248. So, if a creditor be induced for money to withdraw a petition against the allowance of the certificate, or if he sell his debt, and agree at the same time to withdraw his petition, this will avoid the certificate, *ex p. Gibson*, 6 Ves. 5; when otherwise, see 1 Doug. 230; *Archb. B. L.* 205.



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### *Form of Remedy.*

Assumpsit is the most usual remedy on bills, notes, and checks, and is the only remedy where there is no privity of contract between the parties, or against an executor or administrator: *Bishop v. Young*, 2 B. & P. 78; *Barry v. Robinson*, 1 N. R. 293. But debt also lies by the payee against the drawer, on default of the acceptor, or by the drawer against acceptor of a bill, expressed to be for value received, 3 D. & R. 165; and by first endorsee against first endorser, who was also the drawer of a bill payable to his own order: 3 Price, 253.

### *Form of Pleadings.*

DECLARATION.] The plt. is not, when there is a privity of contract between him and deft., independent of the bill, bound to declare on the bill itself, but may declare on such contract. It is always ad- [\*259] visable, however, \*to declare on the bill itself, as the plt. will otherwise, instead of the expeditious and least expensive mode of getting the damages, by having the same referred to the master, be bound to execute a writ of inquiry, *Osborne v. Noad*, 8 T. R. 648; and he cannot, in general, obtain interest; and besides which, if the bill be negotiable, he would, on evidence by deft. of its existence, be bound to show it was in his own possession, *post*.

Title.] The declaration must be entitled specially, if the bill fall due after the first day of term: *post*, "*Declaration*;" *Howe v. Cooker*, 3 Stark. 138.

Venue.] The plt. may lay the venue in any county: *Pinkney v. Collins*, 1 T. R. 571.

Statement of BILL ITSELF.] In general, the bill must be stated in the declaration, like other contracts, *ante*, 116, either in its precise terms, or according to its legal effect, and a variance on any material point will be fatal; and, in general, it is advisable to state no more of the bill declared on than is necessary to enable the plt. to recover: *Bristow v. Wright*, Doug. 667; *Chit. B.* 356; *Selw. N. P.* 398; *Waugh v. Russell*, 1 Marsh. 217; *Siffkin v. Walker*, 2 Camp. 309. A variance in matter of description, as we shall hereafter see, will be fatal. If it be ambiguous whether the instrument be a bill or note, it may be declared on as either: *Edis v. Bury*, 2 C. & P. 559; 6 B. & C. 433, s. c.; *Chit. B.* 21. If the bill be in foreign language, it may, nevertheless, be stated in English, without noticing the foreign language: *Wightw.* 9.

If the bill or note were informal, it may be stated in its terms, with an innuendo of its meaning, which seems the safest course.

*Names of Parties.*] The names of the parties to the bill must be accurately described; a variance in the name of a party, not a party to the suit, is a ground of nonsuit: *Whitwell v. Bennett*, 3 B. & P. 559. A variance in the names of the parties to the suit is no ground of nonsuit, if the misdescribed party's identity be proved: *Boughton v. Frere*, 3 Camp. 29; *Jowett v. Charnock*, 6 M. & S. 45; *Dickinson v. Bowes*, 16 East, 110; *Willis v. Barrett*, 2 Stark. 29. In *Gordon v. Austin*, 4 T. R. 611, the party's identity was not proved. If a bill drawn by the name of Cruch be declared on, in an action against a third person, as drawn by Crouch, it is a fatal variance: *Whitwell v. Bennett*, 3 B. & P. 559; *Hutchinson v. Piper*, 4 Taunt. 810. It has been held, that a mis-description between the real name of an endorser, and that which is alleged in the declaration, is immaterial, if it be the party's name of trade, and the party be identified, *Forman v. Jacob*, 1 Stark. 47.

If a bill purports to have been drawn by a firm consisting of several persons, it may be so described in the declaration, in an action against the acceptor, though, in fact, the firm consisted of one individual only: *Bass v. Clive*, 4 Camp. 78; 4 M. & S. 13, s. c. Where a declaration stated that a bill was endorsed by certain persons trading under the firm of H. and F., by procuration of J. D., it was held that this allegation was supported by evidence of J. D.'s handwriting; and that he, being the managing partner in a firm which carried on all business of buying and selling, under the denomination of H. and Co., was in the habit of endorsing bills in the manner above stated, although there was no such person as F. in the firm of H. and Co., and no direct proof that J. D.'s partners were privy to those transactions: *Williamson v. Johnson*, 1 B. & C. 146; 2 D. & R. 281, s. c.

If one of several persons, acceptors of a bill, were an infant, the holder may declare on it as accepted by the adult only, in the names of both, *Burgess v. Morrill*, 4 Taunt. 468; and, as to what to reply in case deft. plead in abatement, *ib.*, ante, 16. Evidence that other persons joined the deft. in the drawing or accepting the bill, does not constitute a variance: *Mountstephen v. Brooke*, 1 B. & A. [\*260] 224; 1 Saund. 291, e. Deft. should have pleaded in abatement; but an allegation of a note having been made by A. and B. is not satisfied by evidence of a note given by A. alone to secure a partnership debt, *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7; though it would be otherwise, if A. prefixed to his signature, "for A. and B." *Galway v. Mathew*, 1 Camp. 403.

A bill drawn, &c. by an agent, may be stated to have been so by the principal, as that is its legal operation: 12 Mod. 346; *Collis v. Emett*, 1 H. Bla. 313.

A description of the plts., as executors and trustees of A. B., is mere surplusage, the bill being payable to them in the name of the firm which they had assumed: *Aguttar v. Moses*, 2 Stark. 499.

*Day of Drawing Bill.*] This should be the day of the date of the bill, or if not dated then, the day of the drawing. A mistake in this day is immaterial.



*Custom of Merchants, &c.*] It is usual to state that a bill was drawn and accepted, &c., according to the usage and custom of merchants, &c.; yet this is unnecessary, as well as any reference to it in any part of the declaration: *Petit v. Smith*, 1 *Ld. Raym.* 88; *Soper v. Dible*, *ib.* 175; *Ereskine v. Murray*, 2 *ib.* 1542; *Carth.* 83, 269; *Bayl.* 307. In some cases these words will prove useful: *post*, 266.

*Date of the Bill, &c.*] This should be alleged to be on the day on which the bill bears date; and when the bill imports to be payable within a limited time of the date, this must be strictly adhered to, *Cole v. Hawkins*, 1 *Str.* 22; but, if there be no date, then it should be stated to be on the day it issued; and, if that cannot be ascertained, the first day plt. can prove it to have existed: *De la Courtier v. Bellamy*, 2 *Show.* 422; *Hague v. French*, 3 *B. & P.* 173; *Giles v. Bourne*, 6 *M. & S.* 73; *Bayl.* 304. When the date of the bill is alleged as an allegation of description, a variance is fatal: thus, where the declaration alleged that deft. made his certain bill bearing date the same day and year aforesaid, and the real date of the bill was different, it was held by Lord Ellenb. to be fatal, 2 *Camp.* 308, *n.*; and a mistatement of a day in a note payable by instalments, is fatal, *Wells v. Girling*, *Gow*, 21; but, where the declaration stated that deft., on the 3d day of February, &c., made his certain bill, &c., and the bill was dated the 6th of February, it was held not to be a fatal variance, as the declaration did not allege the date as part of the bill; but only alleged that deft. on that day drew the bill, being silent as to the date: *Coxon v. Lyon*, 2 *Camp.* 307, *n.* Where a 2d count, "that afterwards, to wit, on the day and year aforesaid," the deft. drew a certain other bill of exchange, payable two months after date, without mentioning any express date in either count, the last was held sufficient by reference to the first: *Hague v. French*, 3 *B. & P.* 173; *Giles v. Bourne*, 6 *M. & S.* 73, *s. p.* As to manner of stating bill, dated by mistake a wrong day, *Chit. B.* 355; *ante*, 259.

*Place of Drawing.*] It is usual, in actions on inland bills of exchange, and on promissory notes, which are uniformly dated at some particular place, to state that place in the declaration, adding some place with a *videlicet*, in which the action is brought, for a venue; this, however, is not necessary, *Bayl.* 305; and it has been held, that a foreign note may be stated to have been made at any place in England, *Houriet v. Morris*, 3 *Camp.* 304; but it seems doubtful whether, in the case of foreign bills, it might not be a cause of special demurrer: *Bayl.* 22, *n.*; *ib.* 305. The court will not take judicial notice that a bill is drawn abroad; therefore, if it be alleged that it was drawn, &c. at Dub- [\*261] lin, the note will not be \*taken to have been made in Ireland, and to be payable there, without an express allegation to that effect: *Kearney v. King*, 2 *B. & A.* 301; *Sproule v. Legge*, 1 *B. & C.* 16; 2 *D. & R.* 15, *s. c.*; *Deybel's case*, 4 *B. & A.* 243.

*Drawing of Bill, &c.*] For the purpose of showing the deft.'s contract, plt. must state in what manner he became liable, whether by making, accepting, or endorsing the note, &c. The allegation of a party himself having drawn the bill, is sufficient, though the party did so by his agent, because that is its legal effect, 12 *Mod.* 346; *Collis v. Emmett*, 1 *H. Bla.* 313, 6 *T. R.* 659; and so it may be stated, "though a man

sign his name on a blank paper, stamped with a bill stamp, and deliver it to another, to draw above the signature what bill he pleases thereon:" *Bayl.* 307.

*His own proper Hand being thereunto subscribed.*] These words should be omitted, as there are cases in which it may occasion a variance. For instance, if a bill be endorsed *by procuration*, and it be thus stated to have been made by the hand of the party himself, the variance will be fatal: *Bayl.* 319; *Levy v. Wilson*, 5 *Esp. Rep.* 180; *Jones v. Mars*, 2 *Camp.* 305. And, in an action against the drawers of a bill, when the declaration stated, that the defts. made the bill, "*their own proper hands*" being thereunto subscribed, when, in fact, their firm of A. and Co. was subscribed to the bill, Ld. Ellenb. said, "Had it been their own proper *hand*, I should have clearly held it sufficient; as it stands, I entertain some doubt, but I will not nonsuit:" *Jones v. Mars*, 2 *Camp.* 305. See *Jones v. Turnour*, 4 *Carr. & Payne*, 204.

*Direction to Drawee, and his Address.*] The usual formal allegation of a direction to drawee should be omitted; and, at least, in one count, to guard against a variance. Where a bill is not addressed to any one by name, but is nevertheless accepted by deft., this direction should be omitted, and no address stated: 3 *Moo.* 91; *Gray v. Milner*, 3 *Stark.* 336. It is also advisable always to omit the words "by the name and addition of, &c." unless there be a misdescription: *ib.* If a bill is directed to Messrs. A. B. and Co., it is no variance in setting out the bill according to its tenor, to put Messrs. A. B. and Co. without the "r," instead of Messrs. with it: *Bayl.* 310.

*Time when Bill, &c. payable.*] This must be stated according to the fact. If a bill or note be payable at usances, the length of them should be averred, thus, "at two usances, that is to say, at two months after the date thereof," or the omission will be fatal on demurrer (unless, perhaps, where it is alleged that the bill was presented on the day it was payable), but upon demurrer only: *Bayl.* 321; *Smart v. Dean*, 3 *Keb.* 645; *Buckley v. Campbell*, 1 *Salk.* 131.

*To pay at a particular Place.*] When it is expressed in the body of the bill or note, that it is payable at a particular place, so as to require presentment there, it should be so stated in the declaration as a part of the contract: *Roche v. Campbell*, 3 *Camp.* 247, 304; *Price v. Mitchell*, 4 *ib.* 201; *Sanderson v. Bowes*, 14 *East*, 500; *Bowes v. Howe*, 5 *Taunt.* 34, *Chit. B.* 250, 259. If the place of payment be mentioned, so as to constitute no part of the contract, but a mere memorandum, it is not necessary to allege it: *Price v. Mitchell*, 4 *Camp.* 200; *Bayl.* 310. The 1 and 2 *G. 4. c. 78*, relates merely to the acceptance of bills, and does not apply to notes. See *post*, 263.

*To pay to Order.*] It is essential for the plaintiff to show in what manner he derives his title to sue, *Bishop v. Hayward*, 4 *T. R.* 471; therefore, in an action by the assignee of a bill or note, it is necessary to show that the bill or note authorizes a transfer; but, in an action by the payee, it is \*not, *Bayl.* 314; as it is only necessary [\*262] to state the bill according to its legal operation. The payee of a bill, payable *to his order*, may state it to have been payable to himself, *Bayl.* 313; *Frederick v. Cotton*, 2 *Show.* 9, *Garth.* 403, *Smith v.*

*McClure*, 5 *East*, 476; and there is no occasion to aver that he made no order, *ib.* A bill or note payable to a fictitious person, and to be endorsed by him, may be stated to be payable to the person in whose favour the endorsement is made; or, if it import to be endorsed in blank it may be stated to be payable to bearer: *Bayl.* 312. When a bill, through mistake, has been made payable to a wrong person, the mistake may be stated, with an innuendo as to the person meant: *Bayl.* 314; *Willes v. Barratt*, 2 *Stark.* 29; *Bishop v. Hayward*, 4 *T. R.* 470. If a bill be accepted, payable to ———, or order, and a *bona fide* holder insert his name as the payee, the bill may be described as payable to him without noticing the blank: *Attwood v. Griffin*, *R. & M.* 425; 2 *C. & P.* 368, *s. c.* Where the note or bill has been returned to the payee, he may declare in his own right, without noticing that fact: *Chit. B.* 343.

*The Sum payable.*] “If a bill or note is for money of the same appellation as ours, but of different value, it must not be stated as if it were for our money; as if it be for so many pounds, and is drawn and payable in Ireland, it must not be stated to be for so many pounds generally, without something to show that pounds Irish were meant:” *Bayl.* 314; *Kearney v. King*, 2 *B. & A.* 301; *Sprowle v. Legge*, 1 *B. & C.* 16; 2 *D. & R.* 15; 3 *Stark.* 156, *s. c.* When the money in which the bill is payable, is foreign, it is necessary to show, in the declaration, that it is foreign money, or else its value: *Simmons v. Parminter*, 1 *Wils.* 185; 4 *Bro. P. C.* 604; *Chit. B.* 356. The omission of the word “sterling,” is immaterial: *Kearney v. King*, 2 *B. & A.* 301; *Glossop v. Jacob*, 2 *Stark.* 69.

*Value received.*] The words “value received,” are not at all material; they might be wholly omitted in the declaration: *p. Ld. Ellenb., Grant v. Da Costa*, 3 *M. & S.* 352, and see 4 *D. & R.* 211, *Chit. B.* 67; but, if they are stated, and the statement give a wrong meaning to those words, it will be a fatal misdescription: *Bayl.* 315; *Highmore v. Primrose*, 5 *M. & S.* 65. It has been held, that when a bill was expressed to be for “value delivered in leather,” it was no variance to state it in the declaration to have been “for value received in leather,” *Jones v. Mars*, 2 *Camp.* 307; and the following bill, “Pay to F. and Co. or order, £315, value received,” and signed by the drawer, may be declared on as a bill for value received by the drawer from the payee: *Grant v. Da Costa*, 3 *M. & S.* 351; *Highmore v. Primrose*, 2 *Chit. R.* 333. A note described to be “for value received” generally, is not disproved by evidence of a note payable to the plaintiff’s order “for value received in Mrs. L.’s estate:” 7 *D. & R.* 140. If a bill be drawn in the usual form “for value received,” which means by the drawee, and the declaration allege it as value received by the drawer, the variance is fatal: *Highmore v. Primrose*, 5 *M. & S.* 65.

*Directions to place Bill to Account, and words “as per Advice.”]* As to these, see *Chit. B.* 89. It is best to insert them in one count.

*The Delivery of Bill.*] It is not necessary to state that the drawer or endorser of a bill delivered it to the payee, as it is implied in the allegation that he made or endorsed the bill, &c.: *Churchill v. Gardner*, 7 *T. R.* 596; *Smith v. McClure*, 5 *East*, 477; *Bayl.* 316. A statement

of a delivery to the acceptor is untechnical in an action against him, but not demurrable: 5 *East*, 476. In an action against the acceptor, it is not necessary to aver a re-delivery from him after acceptance; for, if a re-delivery, or something tantamount, to show the assent of the drawee to charge himself, be necessary \*to an acceptance, a [\*263] demurrer, by admitting the acceptance, impliedly admits the re-delivery: *Smith v. McClure*, 5 *East*, 475.

*Acceptance.*] "It need not be stated, except in actions against acceptor, or on bills payable within a limited time after sight:" *Bayl.* 316. If unnecessarily stated, it need not be proved: *Tanner v. Bean*, 4 *B. & C.* 312; 6 *D. & R.* 338, *s. c.*; overruling *Jones v. Morgan*, 2 *Camp.* 474. An acceptance by an agent may be stated to be by principal: *Heys v. Heseltine*, 2 *Camp.* 604. If the acceptance were conditional or qualified, it must be so described: *Langston v. Corney*, 4 *Camp.* 176. It is improper to aver that the acceptor's handwriting was subscribed, as it can never help, and, if the bill be accepted by procuration, it would be a fatal variance, *Bayl.* 319, *Levy v. Wilson*, 5 *Esp. Rep.* 180; but it would not be so, if signed by one of a firm, *Jones v. Marr*, 2 *Camp.* 305, *ante*, 257; and it would seem, that it would be obviated by a subsequent promise: *Helmsley v. Loader*, *ib.* 450. Where the time of payment depends on the presentment, and the action is against the drawer of a bill, or endorser of a bill or note, this should be the very day of the presentment, *Bayl.* 317; in other cases, the exact day is not material. The acceptance of a bill after sight should be stated according to the fact: and, when the drawee dates his acceptance on a different day from the date of the bill, the real day of acceptance should be inserted, *Bayl.* 181; but it seems a variance is not material: *Forman v. Jacob*, 1 *Stark.* 46; *Young v. Wright*, 1 *Camp.* 139. Where the declaration alleged that a bill was drawn on the 18th Aug., payable 60 days after sight, and was afterwards, to wit, on the day and year aforesaid, accepted by deft., and the bill appeared to be accepted on the 19th Sept., it was held no variance, 4 *Camp.* 409; though it has been considered, that if the plt. allege in terms that the acceptance was made before the time limited by the bill for its payment, the plt. will be precluded from giving in evidence an acceptance afterwards, *Jackson v. Pigott*, *Ld. Raym.* 364, 12 *Mod.* 212, *s. c.* This doctrine has been disputed: *Bayl.* 317; *Leaper v. Tatton*, 16 *East*, 420.

*Payable at a particular Place.*] If the bill be "accepted payable" at a particular place, according to the provisions of the 1 & 2 *G.* 4, *c.* 78, with the words "There only, and not otherwise or elsewhere," it must be stated accordingly: see, as to averment of presentment at particular place, *post*, 265.

*Conditional Acceptance.*] Such an acceptance must be described accordingly; and, if declared on as an absolute acceptance, it will be a fatal variance though the condition has been performed: *Langston v. Corney*, 4 *Camp.* 176; *Swan v. Cox*, 1 *Marsh*, 176; *Ralli v. Sarell*, *D. & R. N. P. C.* 33.

*Drawing.*] As to this, see *ante*, 259.

*Endorsement.*] "Every endorsement essential to a transfer, must be stated; unnecessary ones should be omitted:" *Bayl.* 320, *Peacock v. Rhodes*, *Doug.* 611, 633. If the endorsement be dated, it is not es-

essential to allege the precise day, as it is not a material variance that an endorsement is stated to have been made before, and is proved to have been made after, the bill became due: *Bayl.* 318. When an endorsement is made after the bill or note became due, the allegation here referred to is proper, and it should not state, "before the bill, &c., became due;" this, however, is not essentially material: *ib.*; *Young v. Wright*, 1 *Camp.* 130, *Purcell v. Macnamara*, 9 *East*, 157. An endorsement by an agent may be stated to have been made by the principal, without noticing the agency. Blank endorsements are alleged in pleading in the same manner as those in full, as to the words, "his own proper [\*264] hand being thereunto subscribed:" see *ante*, 259. \*Where there are several endorsers to a bill between the payee and the deft., the plt. may declare on an endorsement by the payee to the deft., and by the deft. to the plt., without stating those between, *Chaters v. Bell*, 4 *Esp. Rep.* 210, *Williamson v. Johnson*, 1 *B. & C.* 146, 2 *D. & R.* 283, *s. c.*; and, where the plt. sues as a remote endorsee, it is usual to set out in the count every endorsement, and, where the first endorsement is in blank, it is prudent to add a count, stating the plt. to be the immediate endorsee of the first endorser, and striking out, before the trial, all such intermediate endorsements, in order to avoid the necessity of proving the signature of the various endorsers; *Peacock v. Rhodes*, *Doug.* 633; *Kyd.* 206; *Chit. B.* 359. This may be done, though there is a subsequent endorsement in full: *Bayl.* 320. Where the plt. would omit an endorsement, he should represent that which precedes the endorsement to be omitted, to have been made in favour of the person who is endorsee, upon that which follows: thus, if a bill payable to A.'s order be endorsed by him in blank, and delivered to B., and endorsed by B. to C., if C. would omit stating B.'s endorsement, he should state that A. endorsed it immediately to him, C.; *Bayl.* 320. On an endorsement for less than the full sum mentioned in the note or bill, the declaration should show that the residue was paid, 12 *Mod.* 213, *Hawkins v. Cardy*, *Ld. Raym.* 360, *Carth.* 466, *s. c.*: as to the mode of proof of an endorsement, and when it must be proved, &c., *post*.

*Endorsement by an Administrator.*] In an action by the endorsee of an administrator, it is not necessary to state the letters of administration: *Willes*, 359; (see form, 2 *Chit. Pl.* 156.)

*Delivery by Endorser.*] The statement of the delivery is unnecessary, *Churchill v. Gardner*, 7 *T. R.* 596.

*Notice of Endorsement.*] An averment of this is unnecessary: *Reynolds v. Davies*, 1 *B. & P.* 625; *Bayl.* 320.

*Presentment for Payment, &c.*] In an action against the acceptor of a bill, the presentment need never be stated, *Frampton v. Coulson*, 1 *Wils.* 33: unless the bill is made payable at a particular place only, and according to the late act, *Chit. B.* 259, *Fayle v. Bird*, 2 *C. & P.* 303; and if an averment of presentment be unnecessarily stated, it need not be proved, *Ch. B.* 378. On a note payable on demand, it is advisable in one count in an action against the maker to aver a demand: *ib.* 360.

In an action against the drawer or endorser, it is essential to state that the bill or note was presented, or some sufficient excuse, as that the

drawee, or maker, could not be found; or that the deft., had he paid the bill, would have had no remedy against them: *Bayl.* 322, *Mercer v. Southwell*, 2 *Show.* 180; *Doug.* 654; *Rushton v. Aspinall*, *ib.* 659, 680. A subsequent promise by the deft. to pay, is evidence of the presentment for payment, &c., and no special count is necessary to meet such promise: *Lundie v. Robertson*, 7 *East*, 231.

*Day, and Time of Presentment.*] This should be alleged to be on the 3rd day of grace, and, if that be on a Sunday or Christmas-day, Good Friday, or public thanksgiving-day, then it should be the day previous. The day alleged is material, *Bayl.* 325, *Rushton v. Aspinall*, *Doug.* 679; unless the plt. allege, that "afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c.," which is the safer way: *Bynnier v. Russell*, 1 *Bing.* 23: 7 *Moo.* 286, *s. c.* In an action against the acceptor of a bill, payable a limited time after sight, if the declaration allege a presentment for payment, mistaking the day on which such presentment was made, is immaterial: *Bayl.* 325; *Forman v. Jacob*, 1 *Stark.* 46; *supra*. A mistake in the day when an instalment becomes due, in an action on a note payable by instalments, is fatal, *Wells v. Girling*, 1 *B. & B.* 447; *Gow*, *c.* 21; 3 *Moo.* \*79, *s. c.* If a bill [\*265] be payable on an event, it must be averred that that event has taken place: *Chit. B.* 181, 356. In an action against an acceptor *supra protest*, it should be averred that the bill was presented at maturity to the original drawee, *ib.* 243. If the bill was not presented when due, because it could not be presented, the cause of the not presenting it need not be stated, provided the declaration contain the usual or a similar averment, that the bill was *duly* presented according to the custom of merchants, under which averment, evidence of the impossibility of presenting at the time when the bill became due may be given: 2 *Smith*, 224.

*Mode of Presentment.*] It need not be alleged who made the presentment; and, though the declaration allege a presentment by a particular person, it need not be proved to have been presented by him; *Boehm v. Campbell*, *Gow*, *c.* 55. The presentment should be stated to have been made according to the tenor and effect of the bill, to the person who was to pay it; and it seems best always to insert the words, "according to the tenor and effect of the bill: *Huffan v. Ellis*, 3 *Taunt.* 415. The words "duly presented," &c., mean presented according to the custom of merchants: 2 *Smith*, 224. If a bill be payable "at" a banker's, or other person's, it need not be averred it was presented to them, *Giles v. Bourne*, 2 *Chit. Rep.* 300; or to the acceptor at the banker's, though the acceptances be general, *De Bergareche v. Pillin*, 3 *Bing.* 476; and, if a bill be made payable by the acceptor at the house of S., an averment of presentment at the house of S. suffices, *Hawkey v. Borwick*, 4 *Bing.* 135; and, if a bill be accepted payable by certain persons at a particular place, it suffices, in an action against the drawer, to state an averment of presentment to those persons generally, without saying at what place: *Ambrose v. Hopwood*, 2 *Taunt.* 61. It is necessary to aver a presentment for payment at a particular place, if the bill be not accepted payable there according to the provisions of the 1 and 2

G. 4, c. 78; and this, although the drawer request the bill to be accepted at a particular place: *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531.

*Excuse for Presentment.*] If the bill be not presented, and there be a sufficient legal excuse for the non-presentment, the same must be stated, *Smith v. Bellamy*, 2 Stark. 223, *Bayl.* 324; as, that the drawee could not be found; or that the deft., had he paid the bill, had no remedy against him: *Bayl.* 322; *Mercer v. Southwell*, 2 Show. 180; *Doug.* 654; *Rushton v. Aspinall*, *ib.* 680. It suffices to aver, generally, the drawee was not to be found, without stating that any inquiry was made after him, though it is now more usual to state, that diligent search was made, and which must be proved; but it is not necessary to state the reason why the bill was not presented at maturity: *Supra*, 2 *Smith*, 223-4. A mere averment of drawee's insolvency, &c., is no excuse, *Bowes v. Howe*, 5 Taunt. 30, *Chit. B.* 250; nor is a mere removal, without an absconding: *ib.*; *Parker v. Gordon*, 7 East, 385.

*Non-Payment.*] In an action against the acceptor of a bill payable at a particular place, it need not be stated that payment was refused at such place, the usual breach at the end of the declaration being sufficient: *Butterworth v. Le Despenser*, 3 M. & S. 150; 4 Dow, 334; *Giles v. Bourne*, 6 M. & S. 73. In actions against the drawer or endorser, the non-payment must be averred. If the bill was payable at a banker's, it need not be averred they did not pay, though usual so to do: 6 M. & S. 73; 2 *Chit. R.* 300, s. c. In an action on a foreign bill, it is not necessary, though usual, to aver the non-payment of the other parts of the bill: *Carth.* 509; *East v. Essington*, 2 *Ld. Raym.* 810; 7 *Mod.* 86, s. c.

*Notice of Dishonour.*] In an action against the acceptor or maker of a note, it is not necessary to aver that he had notice of the [\*266] dishonour: *Smith v. Thatcher*, 4 B. & A. 200; *Edwards v. Dick*, *ib.*, 212; *Treacher v. Hinton*, *ib.*, 413; *Butterworth v. Le Despenser*, 3 M. & S. 150; *Pearce v. Pemberthy*, 3 Camp. 261. In an action, however, against the drawer or endorser, this averment, or a sufficient legal excuse for not giving the notice, must be stated; and an omission of such an averment is bad, even after verdict: *Bayl.* 185; *Rushton v. Aspinall*, *Doug.* 679; *Lundie v. Robertson*, 7 East, 231.

*Excuse for not giving Notice of Dishonour.*] When the necessary notice has not been given, and there is a sufficient legal excuse for such an omission, such excuse must be averred; as, if the drawer countermanded payment, or had no effects in the hands of the drawee: *Legge v. Thorpe*, 12 East, 171; *Chit. B.* 197 to 215. A promise of payment, &c., which will dispense with proof of notice of dishonour, may be given in evidence, under the usual averment of notice.

*Protest.*] The protest need not be stated in an action on an inland bill, *Windle v. Andrews*, 2 B. & A. 696; *Brough v. Parkins*, 2 *Ld. Raym.* 992; 6 *Mod.* 80 s. c.; *Salk.* 131, s. c.; but, in an action on a foreign one, the plt. must either state it, *Rogers v. Stephens*, 2 T. R. 713; *Gale v. Walsh*, 5 *ib.*, 239, or show that it was not necessary, as that the drawer had no effects in the hands of the drawee: *Legge v. Thorpe*, 12 East, 171. But the omission can only be taken advantage of by a spe-

cial demurrer: *Bayl.* 327. If the plt. aver "that he protested the bill, or caused it to be protested," it will be bad on demurrer, but it is unobjectionable if the deft. pleads over: *Witherly v. Sarsfield*, 1 *Show*, 125; *Salomons v. Stavely*, *Doug.* 684, n.

*Notice of Protest.*] If the deft. is *prima-facie* entitled to notice, it is essentially necessary to prove that he had it, or to show that he was not entitled thereto: *Rushton v. Aspinall*, *Doug.* 680. Under an allegation of notice, it may be questionable whether evidence can be given of what would excuse notice, *Cory v. Scott*, 3 *B. & A.* 619; *Legge v. Thorpe*, 12 *East*, 171; or whether, to let in such evidence, the facts to excuse notice should not be pleaded specially: *Bayl.* 328.

*Payment supra Protest.*] This should be averred according to the fact. In a late case, in an action against the acceptor of a bill by a plt. who became a party, *supra protest*, for the honour of the second endorser, it was held not necessary to state in the declaration, that the party to whom the payment was made by the plt. was the party having title to the bill, the declaration stating that the plt., according to the usage and custom of merchants, paid the bill under protest: *Cox v. Earle*, 3 *B. & A.* 430.

*Bill taken up by Drawer.*] When the drawer sues on a bill payable to a third person, in order to show his interest therein, it is necessary to state that it was dishonoured, and taken up and paid by plt., *post*.

*Liability of Deft. to pay.*] The usual allegation, that deft., by means of the premises, became liable to pay, seems unnecessary, and may be omitted. It is usual, in declaring on promissory notes made within the kingdom, to state that deft. became liable by virtue of 3 and 4 *Anne*, c. 9, which renders these instruments available; but this seems unnecessary, *Brown v. Harraden*, 4 *T. R.* 155; and such an allegation, in the case of a foreign note, would perhaps be fatal: *Bayl.* 22, citing *Carr v. Shaw*, *B. R. H.* 39 *G.* 3. In an action against a drawer or endorser, their liabilities are stated to have been to pay on request; in an action against the acceptor or maker, the liability is stated to pay according to the tenor and effect of the bill or note: *Bayl.* 330; *Ballingalls v. Gloster*, 3 *East*, 481.

*\*Promise of Payment.*] The action being founded on a legal liability, no promise need be stated, though it is usually [\*267] inserted: *Starkey v. Cheeseman*, 1 *Salk.* 128; *Carth.* 509, s. c.; *Hard.* 486. If the promise be stated, it should correspond with the statement of the liability: *Ballingalls v. Gloster*, 3 *East*, 481.

*Common Counts.*] It is usual, and always advisable, to insert the counts for money paid, had, and received; and, on an account stated, they, in many cases, may secure a verdict; and, in an action where there is a privity of contract between the plt. and deft., on some consideration passing between them, independent of the bill, one or more counts should be added to meet the same in evidence. A count for interest is usually inserted, but this is unnecessary. As to the general utility of these counts, and what may be given in evidence under them in an action on a bill or note, *post*.

*PLEA, &c.*] We shall hereafter see what defence deft. may set up to the action: *post*, "Evidence for Defendant." With respect to the mode



of taking advantage of defences arising from a defect in the right of action itself, those which, in effect, deny that the bill, &c. was made, or that the deft. or plt. was party to it, and those which are founded on some defect in the instrument, apparent on the face of it, or on the ground that the supposed drawing, acceptance, or endorsement, do not amount to such act, cannot be pleaded, and can only be taken advantage of under the general issue, non assumpsit, to which they amount. But all defences which admit the existence of a contract, but allege that it was never binding, or that, if it were, it was either performed or discharged before breach, *may* be pleaded specially, *Hatton v. Morse*, 1 *Salk.* 394; *Husband v. Jacob*, 1 *Ld. Raym.* 88-9; *Com. D. Pleader*, E. 14; though, in general, matters which deny that the plt. ever had cause of action, are not pleaded, but are given in evidence under the general issue of non assumpsit, which puts the plt. on proof of his right of action. Where, however, such defences lie more in the knowledge of the deft. than the plt., as in the case of infancy and coverture, it is considered fairer practice to plead them in the first instance, or give notice of them to the plt. previously to the trial of the cause, as otherwise the plt. may be surprised by them at the trial. Defences of the second description, which admit that the plt. once had right of action, are usually pleaded; and a tender, set-off, bankruptcy or insolvency of the deft., and the statute of limitations, must, in all cases, be pleaded: *Draper v. Glasgow*, 1 *Ld. Raym.* 153; see *Chit. B.* 374-5; *ante*, 138.

If there be any misstatement or defect apparent in the declaration of the cause of action, or in the right of action itself, the same may be taken advantage of by general or special demurrer; by a general demurrer, when the misstatement is substantially bad, and by a special demurrer, when it is formally so.

### *Precedents.*

#### ON INLAND BILLS.

##### DECLARATION IN ASSUMPSIT ON A BILL, DRAWER AGAINST ACCEPTOR.

(*Commencement as post*, "Declaration," and *ante*, 139.) For that whereas the said plts. (*ante*, 269), heretofore, to wit, on the first day of January, in the year of our Lord, 1827, at (*ante*, 269), London, that is, at (*venue*), in the county of Middlesex, according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom (*ante*, 269), made their bill of exchange in writing, bearing date (*ante*, 269), the day and year aforesaid (*and then and there directed the same to the said defts. by the name, style, firm, and addition, of Messrs. Twiss and Co. Merchants, Birchin Lane, London, ante*, 261), by which said bill of exchange they, the said plts., then and there requested the said defts., two months after the date thereof, to pay the plts., or their order, the sum (*ante*, 262) of fifty pounds, for value received (*ante*, 262); which said bill of exchange the said defts. afterwards, to wit, on (*ante*, 263) the day and year aforesaid, at (*venue*) aforesaid, in the county aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants (*ante*, 261.) By means whereof (*ante*, 266), and according to the said usage and custom of merchants, the said defts. then and there became liable to pay the said plts. the sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of their, the said defts., said acceptance thereof (*ante*, 266); and, being so liable, they, the said defts., in consideration thereof, to wit, on the day and year aforesaid, at Westr. aforesaid, in the county aforesaid, undertook, and then and there faithfully promised (*ante*, 267) the said plts. to pay them the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of their, the said defts., said acceptance thereof (*ante*, 267.) (*Insert counts upon the con-*

*sideration of the bill between the plts. and defts., and all the money counts, count for interest and account stated, and breach (ante, 267); laying the day in all the common counts after the bill was due (though this is immaterial), and before the action was commenced, and conclude as post, "Declaration.")*

## PAYEE AGAINST ACCEPTOR.

(*Observe the references in preceding precedent.*) For that whereas one E. F. (or certain persons using the name, style, and firm of Hall and Sons, or certain persons, to wit, Hall and Sons), heretofore, to wit, on the 1st day of January, in the year of our Lord 1827, at London, that is to say, at Westminster, in the county of Middlesex, according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made their certain bill of exchange in writing, bearing date the day and year aforesaid (*and then and there directed, ante, 261, the said bill to the said defts., by the name, style, firm, and addition, of Messrs. Twiss and Co., merchants, Birchin Lane, London*); by which said bill of exchange they, the said E. F. (or Hall and Sons), then and there requested the said defts. two months after the date thereof, to pay to the said plts. (*by the name, style, and addition of Messrs. William Bell and Co., ante, 261*), or order, the sum of fifty pounds for value received, and then and there delivered the said bill of exchange to the said plts. (*ante, 262*); which said bill of exchange the said defts. afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, upon sight thereof, accepted. By means whereof, &c. (*Conclude as in the preceding precedent.*)

(*As there is, in general, no privity between the payee and acceptor, i. e. no contract except that founded on the bill, it is not usual to add more than the common money-counts, count for interest, account stated, and breach, and conclude as post, "Declaration."*)

## ENDORSEMENT AGAINST ACCEPTOR.

(*Observe the notes and references, supra, first precedent.*) For that whereas one J. H. (or certain persons using the name, &c., or certain persons, to wit), heretofore, to wit, on the 1st day of January, in the year of our Lord 1827, at London, that is to say, at Westminster, in the county of Middx., according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date the day and year aforesaid (*and then and there directed the same to the said deft. by the name and addition of Mr. John Twiss, merchant, Birchin Lane, London, ante, 261*); by which said bill of exchange, he, the said J. H., then and there requested the said deft., two months after the date thereof, to pay to one W. B., or order, the sum of fifty pounds for value received, and then and there delivered the said bill of exchange to the said W. B.; which said bill of exchange the said deft., afterwards, to wit, on the day and year aforesaid, at Westr., &c., aforesaid, in the county aforesaid, upon sight thereof, accepted, according to the usage and custom of merchants. And the said W. B., to whom, or to whose order, the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill, and before the payment of the said sum of money therein specified, to wit, on the "day and year aforesaid, at Westr. aforesaid, in the county aforesaid, according to the said usage and custom of merchants, endorsed the said bill of exchange; by which said endorsement he, the said W. B., then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said plt., and then and there delivered the said bill of exchange, so endorsed as aforesaid, to the said plt. By means whereof, &c. (*Conclude as ante, 268, first precedent. Add all the money counts, interest, and account stated, and common breach, and conclude as post, "Declaration."* If a second count be added on the bill, or briefly be an object, insert the following short form of endorsement:)

## THE LIKE, STATING A SHORT FORM OF ENDORSEMENT.

And the said W. B. then and there endorsed and delivered the said (*last-mentioned*) bill of exchange to the said plt.

## THE LIKE WHERE THERE ARE SEVERAL ENDORSEMENTS.

It is usual, as we have seen, to strike out all the endorsements after that of the drawer; but, if they be stated, they may be shortly thus:—"And the said W. B. then and there endorsed and delivered the said bill of exchange to one G. H., who then and there endorsed and delivered the same to one I. K., who then and there endorsed and delivered the same to the said plt.," and so on.

## AGAINST ACCEPTOR, WHERE BILL PAYABLE AT A PARTICULAR PLACE.

For that whereas, &c. (*The statement of the bill is the same as in other cases, as ante, 267, until deft.'s acceptance, which is usually stated thus :*) Which said bill of exchange the said deft. afterwards, to wit, on the day and year aforesaid, at Westr., &c., aforesaid, in the county aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants, payable at P. and Co.'s, Lombard Street, (*or, if the bill be accepted, payable at a particular place within the 1 and 2 G. 4, c. 78. Then follow the words of the acceptance, as thus:*) "Accepted according to the said usage and custom of merchants, and the statute in that case made and provided, payable at P. and Co.'s, Lombard Street, and there only, and not otherwise or elsewhere." (*If the action be at the suit of an endorsee, state the indorsement, as ante, 268.*) And the said plt. avers, that afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof (*ante, 264*), to wit, on the 1st day of March, in the year aforesaid, that is to say, at Westr., &c., aforesaid, in the county aforesaid, the said bill of exchange was duly presented and shown at (*ante, 265*) the said P. and Co.'s, Lombard Street, London, aforesaid, for the payment thereof, according to the usage and custom of merchants; and payment of the said sum of money in the said bill of exchange specified was then and there duly required; but that neither the said P. and Co., nor the said deft. (*ante, 265*) nor any person or persons on behalf of the said deft., did or would, when the said bill of exchange was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused; of all which said several premises the said deft. afterwards, to wit, on the day and year last aforesaid, at (*venue*), aforesaid, had notice (*ante, 265*). By means whereof, and according to the usage and custom of merchants, he, the said deft. then and there became liable to pay the said plt. the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested (*ante, 266*); and, being so liable, he, the said deft., in consideration thereof, afterwards, to wit, on, &c., last aforesaid, at (*venue*), aforesaid, undertook, and then and there faithfully promised the said plt. to pay him the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested. (*Insert a count stating a general acceptance, as ante, 267; and then add common counts, interest, account stated, and breach.*)

## DRAWER AGAINST ACCEPTOR, WHERE BILL PAYABLE TO A THIRD PERSON, AND DRAWER HAS BEEN OBLIGED TO TAKE IT UP.

For that whereas the said plt. heretofore, to wit, on the 1st day of January, in the year of our Lord 1827, at London, that is to say, at Westr., in the county of Middx., according to the usage and custom of merchants, from time immemorial used and approved of [*\*270*] within this kingdom, made \*his certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby then and there requested the said deft., two months after the date, to pay to one J. D., or order, the sum of £100, value received, and then and there delivered the said bill of exchange to the said J. D.; which said bill of exchange the said deft. afterwards, to wit, on the day and year aforesaid, at (*venue*), aforesaid, in the county aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants. And the said plt. avers, that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the (*day bill became due*), at (*venue*) aforesaid, the said bill exchange, so accepted as aforesaid, was presented and shown to the said deft. for payment thereof, according to the said usage and custom of merchants, and the said deft. was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof; but that the said deft. did not nor would, at the said time when the said bill of exchange was so presented and shown to him for payment thereof, as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do. And thereupon, afterwards, to wit, on the (*any day about the time*), in the year aforesaid, at (*venue*), aforesaid, the said bill of exchange was returned to the said plt.; and the said plt., as drawer of the said bill of exchange, was then and there called upon, and forced, and obliged, to pay, and did then and there pay, the said J. D. (*or, if an endorser, state the endorsement after the acceptance*) the said sum of money in the said bill of exchange specified, whereof the said deft. afterwards, to wit, on the day and year last aforesaid, there had notice. By means whereof, and according to the said usage and custom of merchants, he, the said deft., then and there became liable to pay to the said plt. the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested; and, being so liable, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at (*venue*), aforesaid, undertook, and then and there faithfully promised the said plt., to pay him the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested.

## ENDORSEES AGAINST DRAWER ON DEFAULT PAYMENT.

(Observe the notes and references, ante, 267, 8.) For that whereas the said deft. heretofore, to wit, on (ante, 260) the 1st day of January, in the year of our Lord 1827, at London, (ante, 260), that is to say, at Weſtr., in the county of Middx., according to the usage and custom of merchants (ante, 260), from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby then and there directed the said bill of exchange to one John Twis (by the name and addition of Mr. John Twis, merchant, Birchin Lane, London or to certain persons by the name and description of, &c.) By which said bill of exchange he, the said deft., then and there requested the said John Twis, two months after the date thereof, to pay to the said deft. (or to one W. B., by the name and addition of Mr. William Bell), or order, the sum of £50 for value received (ante, 262.) (If the acceptance be stated, but which is unnecessary, ante, 263, it is thus:\*) Which said bill of exchange the said John Twis, afterwards, to wit, on the day and year aforesaid, at (venue,) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants. And the said W. B., to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at (venue,) aforesaid, according to the usage and custom of merchants, endorsed the said bill of exchange; by which said endorsement he, the said W. B., then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said plt., and there delivered the said bill of exchange so endorsed to the said plt. (If there be another endorsement, the averment thereof will be similar to the \*last, except in the names.) And the said plt. avers, that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof (ante, 264), to wit, on the 4th day of March, in the year aforesaid, to wit, at (venue,) aforesaid, the said bill of exchange was duly presented and shown to the said John Twis for payment, according to the usage and custom of merchants; and the said John Twis was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, but that the said John Twis did not nor would, at the said time when the said bill of exchange was so presented and shown to him for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which said several premises the said deft. afterwards, to wit, on the day and year last aforesaid, at (venue,) aforesaid, had notice. By means whereof, and according to the said usage and custom of merchants, he, the said deft., then and there became liable to pay the said plt. the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested; and, being so liable, he, the said deft., in consideration thereof, afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, undertook, and then and there faithfully promised the said plt., to pay him the said sum of money in the said bill of exchange specified, when he, the said deft., should be thereunto afterwards requested. (Add counts on the consideration of the bill between the plt. and deft. (if any), and the money counts, account stated, and breach, and conclude as ante, 268.)

[\*271]

(See the form of the short endorsements, ante, 269.)

## ENDORSEES AGAINST DRAWER ON DEFAULT OF PAYMENT, WHERE BILL PAYABLE AT A PARTICULAR PLACE.

For that whereas, &c. (The declaration will be similar to others in actions against drawer, ante, 270, until the statement of the acceptance at the particular place, which will be found, ante, 269; after which, conclude thus:\*) And the said plt. avers, that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 4th day of March, in the year aforesaid, to wit, at (venue,) aforesaid, the said bill of exchange was duly presented and shown at the said P. and Co.'s (ante, 265), for payment thereof, according to the said usage and custom of merchants; and payment of the said sum of money in the said bill of exchange specified was then and there duly required; but that neither the said P. and Co., nor the said J. T. (acceptor), nor any person or persons on behalf of the said J. T. (acceptor), did or would, at the said time when the said bill of exchange was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which several premises the said deft., afterwards, to wit, on the day and year last aforesaid, at (venue,) aforesaid, had notice. By means whereof, &c. (Conclude as in preceding precedent. Add counts for money paid, had, and received, interest, account stated, and breach, and conclude as ante, 268, post, "Declaration.")

## AVERTMENT OF WANT OF EFFECTS TO EXCUSE NOTICE OF DISHONOUR.

(After stating the dishonour, and omitting to state the notice thereof to deft., say: And the said plt. further avers, that, at the time of the making of the said bill of exchange, as aforesaid, from thence until and at the time when the same was so presented, and shown to the said J. T. (*drawee*) for payment thereof, as aforesaid, he, the said J. T. (*drawee*), had not in his hands any effects of the said deft. (*drawer*) nor had he received from the said deft. any consideration for the acceptance or payment of the said bill of exchange, nor hath he, the said deft., sustained any damage for, or by reason of, his not having had notice of the nonpayment of the said sum of money in the said bill of exchange specified; of all which said several premises he, the said deft., afterwards, to wit, on the day and year last aforesaid, at (*venue*), aforesaid had notice. By means whereof, &c. (Conclude as usual in actions against drawer, *supra*. Add common counts, interest, account stated, and breach, and conclude as ante, 268.)

## AGAINST DRAWER ON DEFAULT OF ACCEPTOR.

\*For that whereas, &c. (As in other declarations against drawer, ante, 270, as far [272] as statement of acceptance, which should be omitted. The endorsement should be stated, after which conclude thus:) And the said plt. avers, that afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on (*ante*, 264), aforesaid, at Birchin Lane, to wit, at (*venue*), aforesaid, the said bill of exchange was presented to the said J. T. (*drawee*) for his acceptance thereof, according to the usage and custom of merchants; and the said J. T. (*drawee*) was then and there required to accept the same, but that the said J. T. did not nor would, at the said time when the said bill of exchange was so presented and shown to him for his acceptance thereof, as aforesaid, or at any time afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which said several premises the said deft. afterwards, to wit, on the day and year last aforesaid, at (*venue*), aforesaid, had notice. By means whereof, &c. (Conclude as usual in actions against drawer, ante, 271.)

## ENDORSEER AGAINST ENDORSER.

For that whereas one E. F. (or, certain persons, &c., ante, 266), heretofore, to wit, on the 1st day of January, in the year of our Lord 1827, at London, that is to say, at Westr., in the county of Middx., according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby then and there requested one G. H., two months after the date thereof, to pay to the said E. F., or order, the sum of £100, value received. And the said E. F., to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at (*venue*), aforesaid, according to the said usage and custom of merchants, endorsed the said bill of exchange; by which said endorsement he, the said E. F., then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said deft., and then and there delivered the said bill of exchange so endorsed as aforesaid to the said deft. And the said deft., to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at (*venue*), aforesaid, according to the said usage and custom of merchants, endorsed the said bill of exchange; by which said endorsement he, the said deft., then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said plt., and then and there delivered the said bill of exchange, so endorsed, as aforesaid, to the said plt. And the said plt. avers, &c. (Here state avertment of presentment, and notice and conclude as in declaration against drawer, ante, 271. As to the statement of several or short endorsements, ante, 269)

## FOREIGN BILLS.

## DRAWER AGAINST ACCEPTOR OF FOREIGN BILL.

For that whereas the said plt., (*ante*, 259,) heretofore, to wit, on the 1st day of January, in the year of our Lord, 1827, in parts beyond the seas, to wit, at Paris, that is to say, at (*venue*), according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing, bearing date the day and year aforesaid (and then and there directed the said bill of exchange to the said deft., by the name and addition of,

&c. *ante*, 261); by which said bill of exchange the said plt. then and there requested the said deft., two months after the date of that their (first) of exchange, (second) and (third) of the same tenor and date not paid, to pay to the said plt. (*by the name and addition of, &c., ante*, 261), or order, the sum of £200, value received (*ante*, 262); which \*said [\*273] bill of exchange the said deft. afterwards, to wit, on the day and year aforesaid, at (*venue*), aforesaid, upon sight thereof, accepted, according to the usage and custom of merchants. By means whereof, &c. (*Conclude as in actions against acceptor of inland bills, as ante*, 268.)

PAYER OR ENDORSEER AGAINST ACCEPTOR OF FOREIGN BILL.

For that whereas certain persons, using the name, style, and firm, of James Hall & Co. (*or*, one J. H.), heretofore, to wit, on the 1st day of January, in the year of our Lord, 1813, in parts beyond the seas, to wit, at Malta, that is to say, at London, in the parish of, &c., according to the usage and custom of merchants, from time immemorial used and approved, made their certain bill of exchange in writing, bearing date the day and year aforesaid (*and then and there directed the said bill of exchange to the said deft., by the name and addition of Mr. John Twis, Paris, ante*, 261); by which said bill of exchange the said James Hall and Co. then and there requested the said deft., at two usances, that is to say, at two months after the date of that their first of exchange, second and third of the same tenor and date not paid, to pay to the said plt. (*by the name, style, and firm, of Messrs. William Bell and Co., ante*, 261), or order, 10,000 livres tournoises, value received, and then and there delivered the said bill of exchange to the said plt.; which said bill of exchange he, the said deft., afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants. By means, &c. (*Conclude as in action against acceptor of inland bill, as ante*, 268. *If against an endorsee, state the endorsement, as ante*, 268.)

PAYER OR ENDORSEER AGAINST DRAWER, ON REFUSAL TO ACCEPT.

For that whereas the said defts. (*by and under the name, style, and firm of James Hall and Co., ante*, 261), heretofore, to wit, on the 1st day of January, in the year of our Lord 1813, to wit, at Malta, that is to say, at London, in, &c., according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to J. T. (*by the name and addition of Mr. John Twis, Paris, ante*, 261); by which said bill of exchange the said defts. then and there requested the said John Twis, at two usances, that is to say, at two months after the date of that their first of exchange, second and third of the same tenor and date not paid, to pay to the said plt. (*by the name, style, and firm, of Messrs. William Bell and Co., ante*, 261), or order, 10,000 livres tournoises, for value received, and then and there delivered the said bill of exchange to the said plt. (*if the action be at the suit of an endorsee, state the endorsement accordingly, ante*, 268.) And the said plt. aver, that afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on the 4th day of March, in, &c., aforesaid, at, &c., aforesaid, the said bill of exchange was presented and shown to the said John Twis for his acceptance thereof, according to the said usage and custom of merchants; and the said John Twis then and there had sight of the said bill of exchange, and was then and there requested to accept the same, but that the said John Twis did not nor would, at the said time when the said bill of exchange was so presented and shown to him for his acceptance thereof, as aforesaid, or at any time before or afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; nor did he, nor would he, then, or at any other time, accept or pay the second and third of exchange in the said bill of exchange mentioned, or either of them, but herein wholly failed and made default. Whereupon the said bill of exchange, afterwards, to wit, on, &c., last aforesaid, at, &c., that is to say, at (*venue*), aforesaid, was duly protested for non-acceptance thereof, according to the said usage and custom of merchants; of all which said several premises the said defts., afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, had notice. By means whereof, and according to the said usage and custom of merchants, they, the said defts., then and there became liable to pay to the said plt. the said sum of money in the said bill of exchange, when they, the said defts., should be thereunto afterwards requested; and, being so liable, they, the said defts., in consideration thereof, afterwards, to \*wit, on, &c., last aforesaid, at (*venue*), aforesaid, undertook, and then and [\*274] there faithfully promised the said plt., to pay them the said sum of money in the said bill of exchange specified, when they, the said defts., should be thereunto afterwards requested. (*Add all the common counts, interest, account stated, and breach, and conclude as usual.*)

## PAYER OR ENDORSEES AGAINST DRAWER, ON REFUSAL TO PAY.

For that whereas the said defts. (*by the name, style, and firm, of James Hall and Co., ante, 261*), heretofore, to wit, on the first day of January, in the year of our Lord 1813, to wit, &c., that is, at London, in, &c., according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to John Twis (*by the name and addition of Mr. John Twis, Paris, ante, 261*); by which said bill of exchange the said defts. then and there requested the said John Twis, at two usances, that is to say, at two months after the date of that their first of exchange, second and third of the same tenor and date not yet paid, to pay to the said plts. (*by the name, style, and firm, of Messrs. William Bell and Co. ante, 261*), 10,000 livres tournoises, for value received, and then and there delivered the said bill of exchange to the said plts.; which said bill of exchange the said John Twis, afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants. (*If the action be at the suit of an endorsee, insert the endorsements accordingly, ante, 268.*) And the said plts., in fact, say, that, afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 4th day of March, in, &c. aforesaid, at, &c., aforesaid, the said bill of exchange, so accepted as aforesaid, was presented and shown to the said John Twis for payment thereof, according to the said usage and custom of merchants; and the said John Twis was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof; but that the said John Twis did not nor would, at the said time when the said bill of exchange was so presented, and shown for payment thereof, as aforesaid, or at any times before or afterwards, pay the said sum of money in the said bill of exchange specified, or any part thereof, but wholly neglected and refused so to do; nor did he pay the said second and third of exchange in the said bill of exchange mentioned, or either of them, but therein wholly failed and made default. And thereupon, afterwards, to wit, on, &c., last aforesaid, at (*venue*), aforesaid, the said bill of exchange was duly protested for non-payment thereof, according to the said usage and custom of merchants; of all which said several premises, they, the said defts., afterwards, to wit, on, &c., last aforesaid, at (*venue*), aforesaid, had notice. By means whereof, &c. (*Conclude as in actions for default of acceptance, preceding precedent.*)

See form of want of effects, *ante, 271*.

See a great variety of other precedents on bills, 2 *Chit. Pl. 4 ed.*, 144 to 177. They are too numerous to be inserted here.

### *Evidence for Plaintiff.*

**GENERAL PROOFS.** *Production and Proof of Bill.* } Plt. must produce, at the trial, the bill or note declared on, and prove it, as described in the declaration; and, in the case of a foreign bill drawn in sets; both sets should be produced: *Chit. B.* 378. The production of a bill, however, may be dispensed with when in the possession of the deft., or destroyed; but, in these cases, plt. should show sufficient probability to satisfy the court that the original note was genuine: 1 *Atk.* 445.

When the bill is in the deft.'s possession, the plt. must prove such possession, and that he gave notice to deft., or his attorney, to produce the bill: as to proof of service of notice, *post*, "*Secondary Evidence.*"

[\*275] \*Where an acceptor improperly detains a bill in his hands after acceptance, the drawer may sue him on it, and give notice to produce it; and, on his default, give parol evidence of it; *p. Ld. Ellenb., Smith v. M'Chure*, 5 *East*, 476. Without giving such notice, plt. cannot recover interest on the instrument itself, though he may give it, or an admission of the debt, in evidence, and recover on the money counts. *Fryer v. Brown, R. & M.* 145. In trover for a bill, no notice to produce

is necessary: *How v. Hall*, 14 *Eâst*, 274. Notice to deſt. to produce a check drawn by him, and paid by his banker, is ſufficient to let in ſecondary evidence, though the check remains in the banker's hands, as the banker, being deſt.'s agent, the check, while in his hands, is conſidered in the poſſeſſion of the deſt.: *Partridge v. Contes*, R. & M. 156. As to the *copy*, offered as ſecondary evidence, plt. muſt prove that it is an accurate one, or tranſcript of it, by having compared it with the original. The draft of the declaration, in which the bill is ſet out, will be a ſufficient copy, if the bill was not atteſted by a ſubſcribing witneſs: *Glover v. Thompson*, R. & M. 403.

When the bill is *deſtroyed*, a copy may be given in evidence; but, if the bill or note were of a negotiable nature, evidence of its having been actually deſtroyed, as by fire or otherwiſe, muſt be given, for the purpoſe of ſhowing that deſt. will not be compelled to pay it again; and, without proof to that effect, the plt. cannot recover: *Pierſon v. Hutchinson*, 2 *Camp*. 211; *Mayor v. Johnson*, 3 *ib*. 324; *Davis v. Dodd*, 4 *Taunt*. 602; *Bayl*. 297.

When the bill is *loſt* or *miſlaid*, the plt. cannot recover by merely proving the loſs, and giving a copy in evidence, as *no action at law* can be ſupported againſt a party to a bill of exchange, note, or check, transferable to a *bona-fide* holder, and loſt before or on the day it is due, although a bond of indemnity has been tendered to the deſt., and notice given, *Pierſon v. Hutchinson*, 2 *Camp*. 211, 6 *Eſp. Rep*. 126, s. c.; or even after it became due, and after action brought, *Poole v. Smith*, *Holt*, C. 144; *Powell v. Roach*, 6 *Eſp*. 76; *Toulmin v. Price*, 5 *Ves*. 238; 4 *B*. 273. An acceptor would not be liable on a loſt bill, if the loſs was before the bill was due, though he promiſed to pay it, without a freſh conſideration: *Davis v. Dodd*, 4 *Taunt*. 602. And it has been decided, that when a bill has been loſt after it was due, it having been endorsed by the payee, the endorſee loſing it, cannot, in an action, recover the amount from the acceptor, though he had promiſed to pay a renewed bill, *Hansard v. Robinson*, *Trin. T.* 1827, *MS.* 1 R. & M. 404, n. and *Dart v. Hinks*, *ib*. But it was ruled at N. P., in an undefended cauſe, that an action might be maintained on a loſt bill, if the loſs did not happen till after the bill became due, *Glover v. Thompson*, *ib*.; but this deciſion ſeems questionable, and, according to the caſes above referred to, could not be maintainable. If a bill or note, transferable by delivery, is cut in halves, and half loſt, the holder cannot ſue at law upon the other half, as plt. muſt produce the entire inſtrument, or prove that the part wanting has been deſtroyed; *Bayl*. 299; *Mayor v. Johnson*, 3 *Camp*. 324. But, if the bill were in ſuch a ſtate, when loſt, that no perſon but plt. could have acquired a right to ſue thereon; as, if the bill were not negotiable, *Mossop v. Eadon*, or has not been endorsed, or has been only endorsed ſpecially, *Long v. Bailie*, 2 *Camp*. 214; *Bayl*. 207, *Rolt v. Watson*, 4 *Bing*. 273, plt. may give evidence of its contents, *ib*.

*Variance.*] The bill or note muſt be proved, as ſtated; and any variance in the ſtatement of it in the declaration will be fatal: ſee *ante*, 259 to 262.

*Averments in General.*] If the general iſſue be pleaded, plt. muſt



substantiate every material averment in his declaration: 1. By proving that the bill or note is, either in express terms or in its legal [\*276] effect, the \*same as that described in the declaration; 2. By proving plt.'s title to sue as alleged, whether he be payee, endorsee, or his interest in the note be derived from any other character; 3. By proving deft.'s liability as alleged, showing in what character he became a party to the bill or note; 4. By proving the special averments, and deft.'s failure in his undertaking, &c.; 2 *Phil. Ev.* 2.

If there are any explanatory averments or circumstances connected with the instrument necessary to be proved, whether to rectify a mistake or remove any apparent ambiguity, as where plt. sues upon a bill, &c., purporting to be payable to a person of a different name, and there is an averment to that effect, it must be proved; *Willis v. Barrett*, 2 *Str.* 29; or, where the bill has been incorrectly dated by mistake, and there is an averment to rectify such mistake, it will be incumbent on the plt. to prove it, and show that it was justifiable, *Chit. B.* 376; and, where the endorsee sues the acceptor of a bill, the date having been altered, plt. must prove that the alteration was made by the acceptor, previous to the endorsement by the drawer, *Johnson v. D. of Marlborough*, 2 *Stark.* 313; and, if there have been any erasures, the circumstances under which they were made should be proved: *ib. ante*, 78. Where plts. have no title upon a bill or note, unless they constitute a particular firm, they must prove that they constitute such firm, without specifying its members: *Bayl.* 371, *post*. If the bill were in foreign money, it should be proved what was the rate of exchange, and the value of such money, when the bill fell due, and, if the bill were payable at usances, the duration of such usances should be proved: *Chit. B.* 377.

*Handwriting in general, Proof of.*] The name of the party to the note must appear in some part of it, signed by himself or his agent: *Bayl.* 31. As to the manner of proof, *post*, "*Handwriting.*".

*Subscribing Witness to Bill, &c.*] If the bill, or the endorsement to it, or any other material part, be attested by a witness, it must be proved by him, or some sufficient reason for his absence shown, as that the witness is abroad, or out of the process of the court, as, in Ireland, *Hadnet v. Forman*, 1 *Stark.* 90; or that he cannot be found on diligent inquiry, *Cunkiffe v. Sexton*, 2 *East*, 183, *Burt v. Walker*, 4 *B. & A.* 697. See further, as to what is a sufficient reason for such absence, *post*, "*Deeds, Subscribing Witness to.*" Where there are several subscribing witnesses, it suffices to call one, if he can prove the signature: 2 *Str.* 1254. If the subscribing witness, when called, cannot prove it, &c., the plt. may proceed to prove it by other means: *p. Le Blanc, J., Pea. Rep.* 23. If the subscribing witness be dead, proof of his death and handwriting, and that the deft. was present when the note was prepared, is sufficient, *Nelson v. Whittal*, 1 *B. & A.* 19, 7 *T. R.* 285; and, where the subscribing witness has become insane, blind, &c., proof of his handwriting has been held sufficient proof of the note: *p. Bailey, J., ib.*; *Wood v. Drury*, 1 *Ld. Raym.* 734. But it is most prudent to prove both the handwriting of the maker, and of the witness, in order to establish the identity of the maker, for proof of the handwriting of the attesting witness alone establishes, merely, that some per-

son assuming the name which the instrument purports to bear, executed it, and does not establish the identity of that person: *p. Bailey, J.*, 1 *B. & A.* 21.

*When signed or accepted by Agent.*] If the bill or note be not signed by the deft. himself, but by another person in deft.'s name, 2 *Campb.* 450, or by procuration in his name by an agent, the handwriting of such person, and his authority as agent, must be proved: an authority by parol is sufficient; this may be proved, either proving an express authority or a \*general one, derived from the usual course [\*277] of the agent's employment: 10 *Mod.* 110; 12 *ib.*, 346. Subsequent assent is also evidence of the precedent authority: *Comb.* 450; *Bayl.* 383. A general authority is supposed to continue, until its termination is notorious. Therefore, after the discharge of a servant usually employed, a man will be bound by his signature, until his discharge is generally known: *Bayl.* 383; citing *Beauvais, s.* 231, *p.* 445; *Mol. B.* 2, c. 10, s. 27. And where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk in this form: "For agents of the R. V. B.—J. G." it was held to be no answer to a joint action against them, by the endorsee of such bill, to show, that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the endorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact: *Sanderson v. Brooksbank et al.* 4 *Carr. & Payne*, 286. The agent himself is a competent witness, and should in general be subpoenaed; but his authority or handwriting may be established by other testimony, as where the principal has used an affidavit of the agent, in an application to the court in which it is admitted, the affidavit of the agent may be used as evidence of it: *Johnson v. Ward*, 6 *Esp. Rep.* 47. A declaration of an agent can only be evidence against the principal, where it accompanies the transaction about which he is employed, and, if made at another time, it is not admissible: *Betham v. Benson*, 1 *Gow*, 489. If the authority was in writing, the instrument must be produced, and proved: *Johnson v. Mason*, 1 *Esp. Rep.* 90, 115.

*Proof of Handwriting by Admission of Party.*] It will be sufficient if plt. prove that deft. acknowledged the signature to be his, *Cooper v. Le Blanc, Str.* 1051, *Leach v. Buchanan*, 4 *Esp. Rep.* 226; and this, though the acknowledgment were made pending a treaty for a compromise: *Waldrige v. Kennison*, 1 *Esp. Rep.* 143. An offer from the deft. to the plt., after a note is become due, to give another instead of it, will amount to an admission of deft.'s signature and plt.'s title: *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43. A promise to pay the amount of the bill, or a part payment of it after it is due, is an admission of the acceptance, *Jones v. Morgan*, 2 *Camp.* 474, and of the other party's handwriting, *Helmsley v. Loader, ib.* 450; and payment of money into court generally also admits deft.'s signature: *Gutteridge v. Smith*, 2 *H. Bla.* 374; *Middleton v. Brewer, Pea. Rep.* 16. In an action against an endorser, proof that the deft. admitted to have received a bill corresponding with that upon which the action was brought, that after issue joined he had declared that he came to town to hasten the

trial of a cause brought against him on an endorsement he had made upon a bill, and that he carried the cause down by proviso, was held sufficient: *Dale v. Lubbuck*, 1 *Barnard*, 199; *Bayl.* 380. If an acceptor is sued, and he give plt. a notice to produce papers relating to a bill described therein "as accepted by the said defendant," it is an admission of deft.'s acceptance: *Holt v. Squire, R. & M.* 282. If deft. speak of having been arrested for a debt, and offer a bill, proof of this admission will entitle the plt. to a verdict: *Brathwaite v. Churchill*, 2 *C. & P.* 341. An admission made before the bill was due, and where the holder received the bill on the faith of such admission, the party making it was held precluded from afterwards disputing the fact, on the ground that the signature was a forgery, *Leach v. Buchanan*, 4 *Esp. Rep.* 226; and, where deft. is sued as acceptor, though the plt. fail in proving his handwriting, and it appear to be a forgery, yet proof that deft. had paid several other bills accepted in like manner will establish his liability: *Barker v. Gingell*, 3 *Esp. Rep.* 80. Where an acceptance is signed by the wife for the husband, and he, with a knowledge of the circumstance, promises to pay the bill, it will be an admission of his signature, and no proof will be required: *Helmsey v. Loader*, 2 *Camp.* 450. But, in an action on a bill, which has been shown to the drawer, with the name of the payee endorsed on it, and he merely objected to pay it because he had drawn it without consideration, it was held, in an action against him by the endorsee, that this admission did not dispense with regular proof of the endorsement: *Duncan v. Scott*, 1 *Camp.* 101. An admission of the party's signature will not operate against any other party than the one making it, *Bayl.* 379; therefore, in an action against several drawers, endorsers, or acceptors, an admission upon the [\*278] pleadings by one, of his signature, will \*not exempt the plt. from proving it against the others, 1 *Esp. Rep.* 125, *Barnes*, 381; and proof that one of the endorsers had confessed his signature is not admissible in evidence in an action by an endorsee against the drawer of a bill: *ib.*; *Bayl.* 381. The admissions of a prior holder of a bill are not evidence against a subsequent one, if the bill is not proved to have been in his possession at the time he made the admission: *Pocock v. Billings*, 2 *Bing.* 269; *Barrough v. White*, 4 *B. & C.* 328.

*Evidence under the Common Counts.]* If the plt. cannot substantiate in evidence the facts necessary to support the count on the bill or note, or such count should be defective, he can go into evidence of the consideration for which he received it, and may recover on the common counts, if adapted to such consideration: see *Chit. B.* 363, and cases there referred to; *Thompson v. Morgan*, 3 *Camp.* 101-2; *Tyte v. Jones*, 1 *East*, 58, n. a.; *Alves v. Hodgson*, 7 *T. R.* 241; *Tatlock v. Harris*, 3 *T. R.* 174; *Wilson v. Remedy*, 1 *Esp. Rep.* 245: provided the particulars of his demand state the consideration of the bill, &c., *Wade v. Beasley*, 4 *Esp. Rep.* 7, and his counsel notices such demand in opening the case on the trial: *Paterson v. Zachariah*, 1 *Taunt.* 72; see the cases in *Wells v. Girling*, 1 *Gow. Rep.* 22-3; 8 *J. B. Moore*, 79, s. c. It is not necessary to declare on a promissory note, and, in an action for money lent, the same may be given in evidence: *B. N. P.* 137-8; *Storey v. Atkins*, 2 *Str.* 719. Where, however, the party is

discharged by alteration of the bill, &c., or by the laches of the holder, the plt. will not be allowed to go into evidence of the common counts, *Long v. Moore*, 3 *Esp. Rep.* 155; and, where a promissory note has been given for money due from the deft. to the plt., who declares thereon, together with the money counts, he must prove the note to have been destroyed before he can have recourse to the money counts, if it appear that the money so claimed was that for which the note was given: *Dangerfield v. Wilby*, 4 *Esp. Rep.* 159; *Hadwen v. Mendsabel*, 2 *C. & P.*, *C. N. P.* 20; *ante*, 96-7. The above rule does not, in general, apply when there is *no privity* between the plt. and deft., as between the endorsee and the acceptor of a bill, and the endorsee and the maker of a note, *Johnson v. Collings*, 1 *East*, 98, *Barlow v. Bishop*, *ib.* 434-5, *Whitwell v. Bennett*, 3 *B. & P.* 559, *Houle v. Baxter*, 3 *East*, 177; between whom, if the plt. cannot succeed on the count of the bill, and there be no express promise to pay the amount, the common counts are in general of no avail: *Waynam v. Bend*, 1 *Camp.* 175; *Chit. B.* 364. And a person who becomes party to a bill or note, as a mere surety, is not liable under the common counts: *Wells v. Girling*, 3 *J. B. Moore*, 79.

The instrument itself will, it is said, when duly stamped, in certain cases, be evidence in support of the counts for money lent, paid, had, and received, and that founded on an actual or supposed account stated, *Wells v. Girling*, 1 *Gow. Rep.* 22, 3 *J. B. Moore*, 79, *s. c.*; but, according to *Waynam v. Bend*, 1 *Camp.* 175, such instrument is only evidence under the money counts, as between the *original* parties to it. Thus, a bill is *prima-facie* evidence of money lent by the payee to the drawer, and a note, of money lent by the payee to the maker, *Clarke v. Martin*, 1 *Ld. Raym.* 758, 1 *Burr.* 373; and an endorsement is *prima-facie* evidence of money lent by the endorsee to his immediate endorser: *Bayl.* 164, 286.

A bill or note is *prima-facie* evidence of *money paid* by the holder to the use of the drawer of the one and maker of the other; and a bill, when accepted, is evidence of money paid by the holder to the use of the acceptor; and, if an endorser has taken up a bill, he may, having failed in his first count against the acceptor, on account of a variance, recover under the count for money paid: *Pounal v. Ferrand*, 6 *B. & C.* 439; *Le Sage v. Johnson*, *Forr. Rep.* 23; *Bayl.* 164, *s. c.*; *sed vide* *Gibson v. Minet*, 1 *H. Bl.* 602; *Howle v. Baxter*, 3 *East*, 177; *Cowley v. Dunlop*, 7 *T. R.* 572; *Buckler v. Bultevant*, 3 *East*, 72; *Simmonds v. Parminter*, 1 *Wils.* 186; *Chit. B.* 365. If the drawee, without having effects of the drawer in his [\*279] hands, accept and pay the bill without having it protested, he may recover the amount in an action for money paid, laid out, and expended, to the use of the drawer: *Smith v. Nissen*, 1 *T. R.* 269; *Cowley v. Dunlop*, 7 *T. R.* 576. But, if he has not actually paid the bill in money, and has only given security for it, or he has sustained any costs or damage, he cannot recover, unless the declaration be special: 3 *East*, 169; 8 *T. R.* 610; 7 *T. R.* 204.

A bill, as well as a note, *Vin. Ab. tit. Evidence*, *A. b.* 36, *Ford v. Hopkins*, 1 *Salk.* 283, is *prima-facie* evidence of *money had and received* by the drawer or maker, to the use of the holder, *Bayl.* 487, 4 *ed.*,

cites *Grant v. Vaughan*, 3 Burr, 1516; *sed vide Waynam v. Bend*, 1 Camp. 175. And an acceptance is evidence of money had and received by the acceptor to the use of the drawer: *Thompson v. Morgan*, 3 Camp. 101; *Bayl.* 163. A bill will also be evidence under the count for money had and received, in an action by the payee, who is also the drawer, against the acceptor: *ib.* It has been supposed, that, in an action by an endorsee against an acceptor, the bill may be given in evidence under the count for money had and received: 2 Phil. Ev. 50; *sed vide Waynam v. Bend*, 1 Camp. 175; *Enon v. Russell*, 4 M. & S. 507; *Wells v. Girling, Gow*, 22; 3 Moore, 79, s. c.; *Chit. B.* 366.

A bill will be evidence under the account stated in an action by the payee, who is also drawer, or by the drawer against the acceptor: *p. Abbott, C. J., Rhodes v. Gent*, 5 B. & A. 245. It has been said, an acceptance is evidence of an account stated by the acceptor with the holder of the bill: *Israel v. Douglas*, 1 H. Bla. 239; *sed vide Taylor v. Higgins*, 3 East, 169; *Whitwell v. Bennett*, 3 B. & P. 559. An admission of the debt, may be proved as evidence of an account stated under that count: *Higmore v. Primrose*, 5 M. & S. 65; *Wade v. Beasley*, 4 Esp. Rep. 7.

*Evidence in Answer to Defence*, of defect of stamp, incapacity to contract, illegal consideration, want of consideration, improper presentment, laches of holder, giving time to parties, plt. an outlaw, bankruptcy, award, and satisfaction, &c. The answers which plt. should be prepared to show, in making out his case against the intended defence, will be found interspersed amongst the various defences which it will be hereafter seen debt. may set up, *post.* It will be there found, that debt. must, in some cases, take some preliminary steps before he can compel plt. to adduce evidence under this head: such as his giving plt. a notice of the intended defence, &c.

*Damages.*] Plt. may, in most cases, recover, 1st. the principal sum due; 2d. interest; 3d. all incidental expenses occasioned by the non-acceptance or non-payment, re-exchange, costs of his dishonour, provision, &c.

*With respect to the principal Sum*, plt. will, in general, be entitled to recover to its full amount. A partial failure of the consideration will, in general, be no defence of the quantum to be deducted on that account, as it is matter, not of definite computation, but of unliquidated damages, *post.* Where the holder or endorsee of an accommodation-bill takes it, knowing it to be such, and advances on it but part of the amount, he can only recover as much as he has really paid, *Wiffen v. Roberts*, 1 Esp. Rep. 261; and, where the debt. accepted a bill of £415, to accommodate P. and Co., P. and Co. endorsed it to their bankers for value, and became bankrupts, the bankers knew it to be an accommodation acceptance, and their demand against P. and Co. was £205 only, in action by them upon this acceptance, it was held, they could only recover the £205: *Jones v. Hibbert*, 2 Stark. 304. If, in an action by the endorsee against the drawer or acceptor, he has received any part from the acceptor or [\*280] drawer, he can \*only recover the balance, as it operates so far as a satisfaction, 1 H. B. 88; but, if the part-payment be received from the first endorser, he may recover the whole amount against

the drawer or acceptor: *Walwyn v. St. Quintin*, 1 B. & P. 638; 2 Wils. 262; 1 Rose, 10. However, "where a bill is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such case the endorsee, though he has not given to the endorser the full amount of the bill, yet may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the endorser," *p. Ld. Kenyon*. But this rule only applies where there is some person to receive the overplus: *Pierson v. Dulop*, Cowp. 571.

As to bills payable by instalments, *post*, 281.

*Interest.*] As to when *interest* is recoverable, it is so in an action on a bill or note, as a debt, when it is stipulated for in the bill, and as damages when not specified, 1 Atk. 151; *Cameron v. Smith*, 2 B. & A. 305; and, if the delay of payment arose from the holder's neglect, it may be withheld: *p. Bailey. J., ib.*, 308. And, when the note had been overdue thirty years, the jury withheld it, and the court, on motion, could not increase the verdict by giving it: *De Belloni v. Ld. Waterpark*, 1 D. & R. 16; and, after a tender, it has in some cases been withheld: *Dent v. Dunn*, 2 Camp. 296.

The plt. must produce the bill to entitle him to recover it: *Fryer v. Broom*, R. & M. 145. But plt. need not prove a protest to entitle him to interest, whether against the acceptor or maker of the bill or note, or the drawer or endorsers: 5 Taunt. 240; 2 B. & A. 305, 696. Nor does it seem essential that he should have declared on it: *Paine v. Pritchard*, 2 C. & P. 558. And he may recover under a particular, merely stating the action to be brought "to recover the amount of a note, &c., of £100:" *Blake v. Lawrence*, 4 Esp. Rep. 147. The interest is to be computed in general from the time the bill or note would regularly have been payable: *Bayl.* 279. Thus, if the bill or note be payable after date, an action against the acceptor of the bill, and the maker of a note, payable at a given time, after date or sight, interest is recoverable from the day on which they became due, without proof of any demand: 3 Ves. 134; 3 Bing. 353. So, upon a bill or note payable on presentment, interest must be computed from the presentment: *Bayl.* 279; *Blaney v. Bradley*, Bla. 761. And, if, at the time, a bill fall due, there is no person to recover on it, as where the holder dies intestate, and administration be not taken out, the acceptor will be liable only from the time the administrator demands payment of the principal, *Murray v. E. I. Comp.* 5 B. & A. 204; but interest is payable from the date of the bill or note, if it appear to have been for money lent, *Bayl.* 279; or it promises to pay on demand, *ib.* *Weston v. Tomlinson*, *p. Abbott, C. J.*, cited *Chit. B.* 422; or it specify a sum payable after date, "with lawful interest for the same:" *R. & M.* 381; *Hennesley v. Nash*, 1 Stark. 452. Where the action is against the drawer of a foreign bill, dishonoured for non-acceptance here, and where plt. is allowed a per-centage, as of 10 per cent., he is only entitled to interest from the day the bill ought to have been paid, *Gaul v. McIntosh*, 3 Camp. 51; but where there is no such allowance, the plt. is entitled to interest from the day the bill was dishonoured for non-acceptance: *Harrison v. Dickson*, *ib.*, n.

*As to the Rate of Interest.*] Five per cent. is usually allowed in this country, 5 *Ves.* 803; but the jury may allow either four or five, according to their judgment of the value of money, *p. Bailey, J., 2 B. & A.* 308; and, in the case of a foreign bill, it may be regulated by the rate of interest established in the country where the bill is drawn: so, upon a bill drawn in Bermuda on England, which ought to have been paid in

England, the plt. recovered  $7\frac{1}{2}$  per cent. interest, such being the [\*281] rate of \*interest at Bermuda, *Congas v. Banks*, cited *Chil. B.* 438; but the acceptor can never be liable to pay more than the legal rate of interest in the place where the bill is due: *Worsley v. Crawford, 2 Camp.* 446. When a bill is payable by instalments, the plt. is only entitled to recover the instalments due at the time of the trial, and the interest thereon, *Ashford v. Hand, Andr.* 370; *Robinson v. Bland, 2 Burr.* 1085; 1 *H. B.* 547 (*contra, Beckwith v. Nott, Cro. J.* 505), unless it contain a clause that they shall not become due; and the interest is to be calculated on the whole sum remaining unpaid, and not on the respective instalments, when they would become payable: *Blake v. Lawrence, 4 Esp. Rep.* 147. Interest ceases in general at the time when final judgment may be signed: *Bayl.* 279; *Bur.* 1077. Interest was refused beyond the time of verdict, even where plt. had been unjustly delayed more than two years: *Jarold v. Rowe, 8 Price,* 382. Interest has been allowed in trover for bills from the date of the final judgment, upon all such as had been received before the judgment, and upon all such as had been received afterwards, from the time of the receipt, *Atkins v. Wheeler, 2 N. R.* 205; but it was held at *N. P.*, that interest could not be recovered after the time of conversion: *Mercer v. Jones, 3 Camp.* 477.

*Expenses of Dishonour, Protest, &c.*] The expense incurred by the holder of a bill, at the time of its dishonour, is the charge for noting and protesting; but the antecedent parties are liable for re-exchange, or the usual damages, postage, &c.: *Bayl.* 282; *De Tastet v. Baring, 11 East,* 289.

*Re-exchange.*] When a foreign bill is dishonoured in the country in which it was payable, and returned to that in which it was drawn, and there taken up by the payee or other party, he is entitled to recover re-exchange. But plt. must prove that there was at the time a course of re-exchange between the countries through which the bill has been negotiated, *De Tastet v. Baring, 11 East,* 269; as well as the amount of such re-exchange, *Cullen, 172.* But it is not necessary for him to prove that he has actually paid it, *ib.*; and plt. may recover against the drawer the whole amount of the re-exchange occasioned by a circuitous mode of returning the bill through the various countries in which it has been negotiated, and different hands upon each return; and that though the non-payment of the bill arose from a law of the country on which it was drawn, passed to prohibit such payment: *Mellish v. Simeon, 2 H. B.* 378. Plt., when holder of a note, by which he has the option of being paid either at the place where it was made, or, "according to the course of exchange, may insist upon being paid according to such course of exchange as exists between them when the note became due:" *Bayl.* 283; *Pollard v. Herries, 3 B. & P.* 335. Though, between this country and India, there appears to be no distinct course of re-exchange, yet, "on

the return of a bill drawn here for the payment of pagodas in the East Indies, the practice is to allow for the sum payable by the bill, interest, and all incidental charges, after the rate of 10s. for each pagoda, and five per cent. thereon, from the expiration of 30 days after notice of the bill's dishonour:" *Bay*. 284; *Auriol v. Thomas*, 2 T. R. 52. An acceptor is never liable for re-exchange: *Napier v. Schneider*, 12 East, 420; *Woolsey v. Crauford*, 2 Camp. 445. Upon the subject of damages on the protest and dishonour of a bill, where it appeared that a bill drawn in Demerara had been sent back dishonoured and protested, and the plt. claimed damages to the amount of £25 per cent., which was considered to be the amount of the loss, but, as the bill for £500 had been sent back dishonoured, protested for the whole, as £400 had been paid on it, and that the usual practice, in such cases, was to retain the dishonoured bill here, and send a protest to Demerara, where, upon the arrival of the protest, security was demanded \*and given by the draw- [\*282] ers, and that the whole of the loss from the dishonour was not incurred, unless the bill in the result was not paid, only £25 damages were allowed on the £100 which had not been paid: *Laing v. Barclay and others*, 3 Stark. 42.

#### DRAWER, WHO IS ALSO PAYEE, AGAINST ACCEPTOR.

*Proof of Bill.*] The bill must be produced and proved, as directed *ante*, 274 to 276.

*Proof of Acceptance.*] The debt's acceptance of the bill must be proved. With respect to what is a sufficient acceptance, by 1 and 2 G. 4, c. 78, s. 2, every acceptance of an inland bill must be in writing upon the bill, or, if there be several parts of the bill, on one of such parts. An inland bill cannot be protested for non-payment, unless it has been accepted in writing: 8 and 9 W. 3, c. 17, s. 1.

In the case of foreign bills, a valid acceptance may be by parol, or by writing on the bill itself, or on another paper, as by letter, undertaking to accept bills already drawn: *Clarke v. Cock*, 4 East, 71; *ex. p. Dyer*, 6 Ves. 9. A letter from the drawees of a foreign bill here, to the drawer in America, stating that, their prospect of security being better, they would accept, or certainly pay the bill, is a valid acceptance, though they had previously refused to accept the bill, and again refused payment of it, when presented for payment, and though the letter was not received in America till after the bill became due: *Wynne v. Raikes*, 5 East, 514. A collateral writing, saying that a foreign bill "shall meet with due honour," *Clarke v. Cock*, 4 East, 57, 1 Atk. 621, *Wynne v. Raikes*, 5 East, 520, "or that the holder may rest satisfied as to payment," 1 Str. 648. *Wynne v. Raikes*, 5 East, 514, *Clarke v. Cock*, 4 ib., 57, or a direction by the drawer to a third party to pay the sum in the bill out of a particular fund, *B. N. P.* 270, it is a sufficient acceptance. So, transcribing the word "accepted," "presented," "seen," or even the day of the month, *Comb.* 401, amounts to an acceptance of a foreign bill, 3 Burr. 1663, 2 Atk. 611; and it is sufficient acceptance if the party write "accepted, C. N.," 3 Moo. 91, 5 East, 520, *Pier-son v. Dunlop*, *Cowp.* 571; or the words "not accepted" will, in some instances amount to an acceptance: as, where it is accompanied



by circumstances which may show an intention to deceive the party presenting it: *Bayl.* 78. But it is no acceptance if the drawee apprises the party at the time, that what he had written was no acceptance: *ib.* A verbal acceptance of a foreign bill is, as we have seen, sufficient; but it is no acceptance where the drawer, on presentment, said, "there is your bill—it is all right," 1 *Esp. Rep.* 17; and the words, "your bill shall have attention," were deemed too ambiguous to admit of an acceptance, unless evidence be adduced to show that these particular words denoted an acceptance between the parties: *Rees v. Warwick*, 2 *B. & A.* 113. A verbal promise to accept, though the party expressly defer a written acceptance, as, where he says "leave the bill, and I will accept it," is a complete acceptance; and a verbal promise to accept a returned bill when it shall come back is binding, if it do come back: *Cox v. Coleman*, *MS.* 6 *Geo.* 2 *Bayl.* 134. Saying, "send the bill to my counting-house, and I will give directions for its being accepted," is not, of itself, an acceptance: the bill must be sent to the counting-house: *Bayl.* 147; *Anderson v. Hick*, 3 *Camp.* 179.

A constructive acceptance will, in some cases, render the acceptor liable on foreign bills; as, where a bill is left for the express purpose of being accepted, and the bill is kept, under particular circumstances, an unreasonable length of time, or other act, which induces the holder not to protest it, or which is intended to surprise him, and induce him to consider the bill as accepted: *Clavey v. Dolbin*, *R. Temp.* [\*283] *Hard.* 278. Where the drawee, as soon as he received the bill, transmitted it to the acceptor, desiring him to accept and hand it over to plt.'s agent in London, which was the usual mode of dealing between the parties, plt. hearing nothing of his bill from his agent, wrote to deft. as to the delay, who replied that he had retained the bill because he once meant to accept it, which he now declined doing, *Ld. Ellenb.* said, such a retention was as much an acceptance as if he had written his name upon the face of it: *Harvey v. Martin*, 1 *Camp.* 425, *n.* The question of reasonable time will necessarily depend upon the facts of each particular case, and the conduct of the parties: *p. Abbott, C. J., Mason v. Barf*, 2 *B. & A.* 36. The mere non-return of the bill, unaccompanied by any other act, or the disfiguring or even destroying the bill; will not, of itself, constitute an acceptance, *Jeune v. Ward*, 1 *B. & A.* 653, 2 *Stark.* 326, *s. c.*; *Ellenb. C. J. diss.*; and the drawee may erase his acceptance previous to any communication of his having accepted the bill: *Cox v. Tory*, 5 *B. & A.* 474. By the usage of trade in London, it is usual for bankers on whom checks are drawn to retain them till five o'clock in the afternoon of the day they are presented for payment, and it may then be returned any time before that hour, though it have been previously cancelled by mistake: *Fernandez v. Glyn*, 1 *Camp.* 426.

An acceptance, being an absolute undertaking to pay, may be made even after the time appointed by the bill for payment, *p. Ld. Ellenb. in Wynne v. Bankes*, 5 *East*, 521, *Chit. B.* 169; and even after a prior refusal to accept, *ib.*, so as to bind the acceptor, who would, in such case, be liable to pay the bill on demand: *ib.*

An absolute acceptance is an engagement to pay the bill according to

its tenor: *Chit. B.* 173. Such acceptance is usually made by writing on the face of the bill "*accepted*," and subscribing the acceptor's *name*, or by doing either alone. However, on a written acceptance by any other person than the drawee, it would seem essential that his name should appear: *Bayl.* 142. When the bill is payable at sight, the day of the acceptance should be also written, *Beawes*, *Pl.* 266; but, if the acceptance appears to have been written by the deft. under a date which is not in his hand-writing, the date is evidence of the time of acceptance; as it is the usual course of business for a clerk to write the date, and for the party to write his acceptance under it: *Glossop v. Jacob*, 4 *Camp.* 227. A mark put on a check by a London banker, to show that the drawer has effects in his hands, and that it will be paid, amounts to an acceptance; as it is the practice of London bankers, if one banker holds a check drawn on another, and presents it after four o'clock, not then to pay it, but to put such a mark on it, and it is in consequence paid next day at the clearing house: *Robson v. Bennet*, 2 *Taunt.* 388; see further *Chit. B.* 173 to 178.

A conditional acceptance depends on a contingency, and is an engagement to pay according to the tenor of such acceptance, and, as it seems, becomes absolute so soon as the conditions of it are performed. The plt. cannot recover on it unless he prove that the condition has been performed, *Swan v. Cox*, 1 *Marsh.* 176, or prove a sufficient excuse for the non-performance: *Leeson v. Pigot*, *Bayl.* 187; *Bowes v. Howe*, 5 *Taunt.* 30. Any act which evinces an intention not to be bound unless upon a certain event, is a conditional acceptance; as, where the drawee of a bill on account of a cargo consigned to him writes that it will not be accepted till a cargo of wheat arrives, the deft. is liable as acceptor on such arrival: *Miln v. Prest*, 4 *Camp.* 393. Saying, "send the bill to my counting-house, and I will give directions for its being accepted," is not of itself an acceptance; the bill must be sent to the counting-house: *Bayl.* 147; *Anderson v. Hick*, 3 *Camp.* 179. So, "an acceptance to pay when remitted," is a conditional acceptance, *Bayl.* 153; and plt. must give evidence to show that he had remitted: *Banbury v. Lesset*, 2 *Str.* 1211. So an answer by a drawee, who lived in London, that a ship was consigned to him and a person in Bristol, and that, till he knew to which port the ship \*would come, he could [\*284] not accept, connected with a subsequent answer, that the bill was a good one, and would be paid, though the ship should be lost, was held a conditional acceptance only; it being clear that the drawee looked for an opportunity of reimbursing himself, and had three events in contemplation—the ship's arrival at Bristol, her arrival at London, and her loss: in the two latter he should have the opportunity, and therefore accepted, and in the former he should not, and did not accept: *Bayl.* 153; *Sproat v. Mathews* 1 *T. R.* 182. So, an answer by the drawee that he could not accept until a navy bill should be paid, will operate as an absolute acceptance upon the payment of the navy bill: *Pierson v. Dunlop*, *Cowp.* 571. If the drawee says he cannot accept without further directions from J. S., and J. S. afterwards desires him to accept, and draw upon A. B. for the amount, the mere drawing upon A. B. will not make this an acceptance, although the actual payment of the bill upon

him may: *Bayl.* 156; *Smith v. Missen*, 1 *T. R.* 269. And a promise to accept in future, made on an executory consideration, will not bind while the consideration remains executory, unless it influence some person to take or to retain the bill: *Bayl.* 145; *Pillans v. Van Mierop*, 3 *Burr.* 1669. If a man purposes making a conditional acceptance only, he should be careful, if he make it in writing, to express the conditions therein; for it may at least be doubtful whether parol evidence of such conditions would be admissible: if it were, the *onus* of proving them would be upon the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it: *Bayl.* 155.

The acceptance may be *general*, to pay any where, or *special*, to pay at a particular place. According to the late act, 1 and 2 *G. 4*, c. 78, an acceptance, stating the bill to be payable at a banker's or particular place, is not a special acceptance, unless it expressly state the bill payable at that place *only, and not otherwise, or elsewhere*. As to presentment of such bill, *post*, 286.

A *partial* acceptance *varies* from the tenor of the bill; as, where it is made to pay part of the sum for which the bill is drawn, *Wegerstoffs v. Keene*, 1 *Str.* 214, *Chit. B.* 182, or to pay at a different time, *Molloy*, 233, *Bay.* 87, *Walker v. Atwood*, 11 *Mo.* 190, or place: see the cases of *Sebag v. Abitbol*, 4 *M. & S.* 462; *Gammon v. Schmoll*, 5 *Taunt.* 344, *post*; *p. Abbott, J.*, *Cowie v. Halsall*, 4 *B. & A.* 198-9; *Chit. B.* 182. An acceptance may also vary from the tenor, in the manner in which the acceptor undertakes to pay the bill, *Petit v. Benson*, *Comb.* 452; as, for instance, part in money, and part in bills, or payable at a banker's, &c. Where an acceptance varies in a material respect from the tenor of the bill, if the holder intend to resort to the other parties to the bill in default of payment, he should immediately give notice to them of such conditional or partial acceptance, *Mar.* 68, 85, *Paton v. Winter*, 1 *Taunt.* 422-3, *p. Bayley, J.*, in *Sebag v. Abitbol*, 4 *M. & S.* 466, *Chit. B.* 182, and should, if he meant to avail himself of the acceptance, express in his notice the nature of it; for any act from whence it may be collected that the holder does not acquiesce in the acceptance, such as a general notice of non-acceptance, will be a waiver of it: *Sproat v. Matthews*, 1 *T. R.* 182; *Bentinck v. Dorrien*, 6 *East*, 200; *Bayl.* 116; *Chit. B.* 182.

With respect to the effect of the acceptance, Mr. Chitty observes, that, if absolute, the acceptor is liable to pay it, according to the tenor of the bill, *Poth. Pl.* 164, *Leftley v. Mills*, 4 *T. R.* 174, and, if conditional or partial, he is liable to pay according to the tenor of the acceptance: *Poth. Pl.* 115, 6, 7. A drawee, having accepted a bill after a condition annexed thereto by the endorser, is bound thereby, and need not pay the bill until the condition be performed: *Robertson v. Kensington*, 4 *Taunt.* 30. He is *primarily* liable to pay the bill: *Laxton v. Peat*, 2 *Camp.* 187, *n.* If he accepted the bill without [\*285] value, and for the accommodation of the \*plt., he may resist the payment, and show the acceptance was partly only for value, and, as to residue, that it was for the plt.'s accommodation: *Darnell v.*

*Williams, 2 Stark. 166; Chit. B. 69.* As the interests of third persons are generally involved in the efficacy of a bill, an acceptance will, when the bill is in the hands of a third person who has given value for it, and who became the holder before it was due, be obligatory on the acceptor, though he received no consideration, and that circumstance were known to the holder, *Simmonds v. Parminter, 1 Wils. 187-8, Knox v. Smith, 3 Esp. Rep. 46, Chit. B. 183*; as the object of an accommodation acceptance is to enable the party accommodated to obtain money or credit from a third person; and, therefore, the want of consideration furnishes no defence to one who has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer: *ib. ibid; ex. p. Marshall, 1 Atk. 231.* See further, as to defence of want of consideration, *post*; as to how far acceptance is revocable, see *post*; and when the acceptor is discharged, *post*.

The acceptance admits the drawer's ability, and the acceptor cannot set up as a defence the want of it: *Taylor v. Croker, 4 Esp. Rep. 187; sed vide 4 Price, 300.* It admits the drawer's handwriting to the bill, and, if drawn by procuration, the procuration, *Robinson v. Yarrow, 7 Taunt. 455, Porthouse v. Parker, 1 Camp. 83*; see, however, *Allport v. Meek, 4 Carr. & Payne, 267*; and it is no defence for an acceptor by an action for a *bona fide* holder, that the drawer's name has been forged: *Price v. Neal, 3 Burr. 1354; 1 W. Bla. R. 390, s. c; Smith v. Chester, 1 T. R. 655*; and see further, *infra*. If the bill be drawn in the name of a firm, the acceptor cannot object that it was drawn by a single person: *Bass v. Clive, 4 M. & S. 13.* An acceptance by an executor on account of debts due from his testator is an admission of assets, and will therefore make him personally responsible in case there be no effects of the testator in his hands: *Semb. King v. Thom, 1 T. R. 487; Chit. B. 7 ed.* If the holder of a bill, the acceptance of which turns out to have been forged by an endorser, delivers it up to him, and receives a fresh bill, he may recover upon the latter, unless there was an agreement between him and such endorser to stife a prosecution for the forgery: *Wallace v. Hardacre, 1 Camp. 45.*

*As to the Mode of proving Acceptance.*] The written acceptance must be proved by evidence of the handwriting, *ante, 276*, or, if there be a subscribing witness, by calling him, *ante, ib.*; or by the party's admissions, *ante, 277.* If the deft. acknowledges his handwriting, or promises to pay, *Jones v. Morgan, 2 Camp. 474*, or pays part, *Vaughan v. Fuller, 2 Str. 1246*, it is a sufficient admission to dispense with any further proof: *ib., ante, 277.* If a party to a bill, on being asked if it be his own handwriting, answer that it is, and will be duly paid, or if he has paid several other bills, accepted in the same handwriting, proof of either of these facts will preclude him afterwards setting up as a defence the forgery of his name; for he has accredited the bill, and induced acceptor to take it: *Leach v. Buchanan, 4 Esp. Rep. 226; 3 Esp. Rep. 60; 1 Marsh. 159.* Where, in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to a bill described as the bill in question, "accepted by the said deft.," the notice was held to be *prima facie* evidence of the acceptance: *Holt v. Squire, 1 R. & M. 282.* In the case of a conditional acceptance, if the terms of

it be ambiguous, parol evidence may be resorted to, to explain them: *Swan v. Cox*, 1 *Marsh.* 179.

If the acceptance of a foreign bill were by *parol*, it should be proved by calling the witness who heard the drawee accept; and, if the answer or undertaking to accept were given to a clerk, he must be subpoenaed. If the acceptance were by an agent, *ante*, 276. Proof merely that some person at the house of the drawee said that the bill would be taken up when due, without any evidence of such person's having authority to give the answer, would be insufficient: *Sayer v. Kitchen*, 1 *Esp. Rep.* 209.

\*The identity of the deft., as to the person who accepted the [\*286] bill, must be proved. Slight evidence will suffice; but it is not enough merely to prove that a person calling himself by the same name accepted the bill: *B. N. P.* 171; *Middleton v. Sandford*, 4 *Camp.* 34; *Parkins v. Hankshaw*, 2 *Stark.* 239.

In an action against several acceptors of a bill, or makers of a note, the handwriting of each must be proved, *ante*, 277-8, *Gray v. Palmer*, 1 *Esp. Rep.* 135; one of whom is competent to prove the handwriting of the others: *ib.*, *York v. Blott*, 5 *M. & S.* 71. If the defts. are partners, plt. must prove the partnership at the time of the acceptance: *post*, "Partners." If a bill be accepted by one of several partners, proof of the partnership, and the party's handwriting, will be evidence to charge the firm, *Mason v. Rumsey*, 1 *Camp.* 384, except it appear that the plt. had notice that the firm would not be bound by the party's acceptance, *Gallway v. Smithson*, 10 *East*, 264; or the bill was not accepted for partnership purposes, or that there was covin between the party accepting and the plt., *Skirreff v. Wilks*, 1 *East*, 48, *Ridley v. Taylor*, 13 *East*, 175, *Green v. Deabin*, 2 *Stark.* 347; and it will not be binding, even though the other partner be a dormant one: *Lloyd v. Ashley*, 2 *C. & P.* 138. The admission of a partner concerning a partnership transaction, though made after dissolution, is sufficient evidence to charge the firm, *Wood v. Braddick*, 1 *Taunt.* 104; and, after the partnership has been established, an admission by one partner, in an answer to a bill filed, will bind the firm, *Grant v. Jackson*, *Pea. Rep.* 268, *Hodenpyl v. Vengerkved*, *Chit. B.* 381; but, where there is no partnership, an admission by one party to a bill will not bind the other: 1 *Esp. Rep.* 135. In an action against three persons as acceptors of a bill, the circumstance of two of them having been outlawed, will not dispense with proof of their joint liability, although the deft. who alone pleaded to the action was in justice liable to pay the debt, *Skirreff v. Wilks*, 1 *East*, 48; but an admission by one partner of his partnership with his co-defts., who had been outlawed, was sufficient proof of the partnership as against him: *Sangster v. Mazzarredo*, 1 *Stark.* 161. In an action against three partners, as drawers of a bill of exchange, drawn by an agent of the firm upon one of the partners, it was held that the acceptance by the drawer was evidence against the three partners of the bill having been regularly drawn: *Porthouse v. Parker*, 1 *Camp.* 82. The admission of one of several makers of a promissory note, is sufficient to take the case out of the statute of limitations in a separate action against the others: *Chit. B.* 374. Where one of two defts., makers of a note, suffer judg-

ment by default, his signature must be proved on the trial of the other: *Chit. B.* 381, *n. g.*

In an action by an executor against the acceptor of a bill, on a promise laid to the testator, the plt. must prove that the bill was accepted in the testator's lifetime: *Anon.* 12 *Mod.* 447; *Sarel v. Whine*, 3 *East*, 409.

*Proof of Presentment.*] In an action against the acceptor, if the acceptance is a general one, as where no place is specified for payment, or where a particular place is mentioned, without any further expression, *Bayl.* 157, it is not necessary to prove presentment, *Turner v. Hayden*, 4 *B. & C.* 1, even though such presentment has been necessarily averred, *Freeman v. Rennel*, *cor. Abbott, C. J.*, *May*, 1826, *cited Chit. B.* 402, *Fayle v. Bird*, 6 *B. & C.* 531; and, though the acceptor has sustained damage from the want of presentment, 4 *B. & C.* 1, *Chit. B.* 7 *ed.* 192; and an acceptor of a bill payable generally is not discharged, though the holder neglect to present it for three or four years: *Farquhar v. Southey*, 2 *C. & P.* 497; 1 *M. & M.* 14, *s. c.* But, if the acceptance be a qualified one, payable at a particular place only, and not otherwise or elsewhere, under 1 and 2 *G. 4, c. 78*, or it be made payable in the body of it at a particular place, and the contract is thereby qualified, the plt. must prove that it was presented at the place specified in the acceptance, *Rowe v. Young*, 2 *B. & B.* 165; and a demand at such particular place is \*a demand on the acceptor: *Saunderson v.* [\*287] *Judge*, *H. B.* 509; *De Bergareche v. Pillen*, 3 *Bing.* 476.

A foreign bill of exchange was drawn by A. upon C. & Co., who resided at Liverpool, in favour of L. R. & Co., and by L. R. & Co. endorsed to the plaintiffs. The bill was drawn, "Sixty days after sight, pay to L. R. & Co. in London," &c. It was refused acceptance by the drawee, but was accepted under protest for honour of the drawer by the defendants, as follows:—"accepted under protest for honour of L. R. & Co., and will be paid for their account if regularly protested and refused when due;" this bill was presented for payment at the residence of the drawee in Liverpool, and protested at Liverpool for non-payment; but it was not presented for payment, or protested, in London, where the drawees had not any house of business:—*held*, that the holders were entitled to recover against the acceptors for honour; and that under these circumstances a presentment in London and protest there were not necessary. *Mitchell v. Baring, et al.*, 4 *Carr. & Payne*, 35. It is not necessary that a bill so accepted at a place named, should be presented there on the very day it becomes due, provided the money is not lost by such neglect, *Rhodes v. Gent*, 5 *B. & A.* 244; and although a presentment must be proved, yet it is not necessary to show a notice of dishonour: *Burrell v. Lonsdale*, *cor. Littledale*, 1826; *Roscoe, Evid.* 125. See further, as to the mode of, and time for presenting a bill for payment, *post*.

*Proof under Common Counts.*] As to this, see *ante*, 278.

*Proof in Answer to Defence.*] As to this, see the defences, *post*.

#### DRAWER, WHO IS NOT PAYEE, AGAINST ACCEPTOR.

*Proof of Return and Payment of the Bill.*] When the drawer of a

bill, payable to the order of a third person, and returned to and taken up by him, sues the acceptor, he must prove such return to him, and his payment of the bill, in order to show that the right of action is vested in him: *Simons v. Parminter*, 1 Wils. 185. The payment of the bill may be proved by the payee or endorsee, who returned the bill; but plt. must adduce some direct evidence of payment by him, as a general receipt, on the back of the bill, is *prima-facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of payment by the drawer, though it is produced by him: *Scholey v. Walsby*, *Pea. Rep.* 24; *Pfiel v. Vanbatenberg*, 2 *Camp.* 439.

*Proof of Acceptance.*] This is necessary, as in other actions against acceptors, and as to which, see *ante*, 285. It is not necessary to prove that the acceptor had effects in hand, as the acceptance is itself *prima-facie* evidence that the acceptor received value from the drawer; *Vere v. Lewis*, 3 T. R. 183. The bankruptcy of the acceptor is no defence against the drawer, who has paid the bill since the bankruptcy: *Mead v. Braham*; 3 M. & S. 91.

#### PAYEE, WHO IS NOT DRAWER, AGAINST ACCEPTOR.

The evidence in this case will be similar to that required in an action by the drawer, who is also payee, against acceptor, *ante*, 282 to 287. If a bill or note, however, be payable to a firm of A. B. and Co., and A. B. and C. D. sue thereon, they must prove that they were, at the time the bill or note was given, the component members of such firm: *Chit. B.* 389.

#### ENDORSEE AGAINST ACCEPTOR.

*Proof of Deft.'s Acceptance.*] The plt. must prove the acceptance which creates deft.'s liability, as *ante*, 285.

*Proof of Drawing.*] The handwriting of the drawer to the drawing is considered as admitted by the acceptance, and need not be proved, and cannot be contradicted by the deft.; and the circumstance of its having been forged constitutes no defence, unless it appear the bill was accepted before the drawee, deft., had sight of the bill; in which case, it appears, the drawer's handwriting must be proved: *Tree v. Hawkins*, *Holt*, C. 550; *Pea. Evid.* 348; *sed quære*; see *Chit. B.* 389, a.

*Proof of Endorsement, when Necessary.*] In an action against the acceptor of a bill, all the endorsements stated, though some [\*288] may have \*been unnecessarily so, must be proved, *Bayl.* 370, *Critchlow v. Parry*, 2 *Camp.* 182, *Chit. B.* 391; but the necessity of this is usually avoided by another count, omitting the unnecessary endorsements: *ib. Chit. B.* 359, n. None of the endorsements are admitted by the acceptance, *Smith v. Chester*, 1 T. R. 654; and, if the bill be negotiable in the first instance only by endorsement, the endorsee plt. must prove the bill was endorsed by the person to whose order it was intended to be made payable, *ib.*, *McFerson v. Thoytes*, *Pea. Rep.* 20; and such first endorsement must be proved, though the bill be payable to the drawer's own order, and endorsed by him: *ib.*,

*Bosanquet v. Anderson*, 6 *Esp. Rep.* 43. Where the first endorsement is in full, directing the acceptor to pay the bill to a certain person, who has endorsed the same to plt., he must, in an action against the drawer or acceptor, prove that person's endorsement: *Potts v. Read*, 6 *Esp. Rep.* 57; *Mead v. Young*, 4 *T. R.* 28; *Chit. B.* 186-7. Even the circumstance of the deft.'s having accepted the bill after it was endorsed, does not dispense with the proof of such endorsement: *ib.* *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43. And, where the bill was shown to the drawer, with the name of the payee endorsed on it, and the drawer objected to the want of consideration only, it was held not to supersede the necessity of proving the endorsee's handwriting; *Duncan v. Scott*, 1 *Camp.* 100. And, though the drawee deft., by the terms of his acceptance, make it payable at a banker's, they must, in an action for the money, as paid for his use, prove the first endorser's handwriting: *Foster v. Clement*, 2 *Camp.* 17.

Where the bill is payable to the order of a fictitious person, proof that the deft. knew of that circumstance when he accepted the bill, will dispense with the proof of the supposed endorser's handwriting: *Chit. B.* 64.

With respect to the proof of endorsements *subsequent* to the first, if the first endorsement was in blank, it will be unnecessary, in any action, to prove any of the subsequent endorsements, although they were in full, *Walwyn v. St. Quintin*, 1 *B. & P.* 658, *Charters v. Bell*, 4 *Esp. Rep.* 210, *Smith v. Clarke*, 1 *ib.*, 180; they may be struck out of the bill at the time of the trial: if, however, they be stated in the declaration, and there be no count omitting such statement, they must be proved: *Smith v. Chester*, 1 *T. R.* 654; *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43.

If the endorsement be by *procuracion*, the endorsement, as well as the authority to make it, must be proved: *Robinson v. Yarrow*, 7 *Taunt.* 455; 1 *Moo.* 150, *s. c. Post*, "Principal and Agent."

If the bill or note be payable to the order of *several persons*, not in partnership, the right to transfer is in all collectively, and they must all endorse the bill, *Bayl.* 43; and the handwritings of each must be proved, *Carvick v. Pickery*, *Doug.* 653; and, *p. Ld. Ellenb.*, *Bosanquet v. Anderson*, 6 *East*, 43; and though it was held, in a case at N. P., that an acceptance after an endorsement by one of the payees admitted the regularity of the endorsement, *Jones v. Radford*, 1 *Camp.* 83, this decision seems questionable; *Chit. B.* 393. In an action by the endorsee against the acceptor, where there was no actual proof of the handwriting of one of the endorsers, but it appeared that the endorsement was upon the bill when the deft. accepted it, and that he promised to pay it, and it was left to the jury, who found for the plt., and the court refused a new trial, and thought it a question for the jury, whether the acceptance and promise did not amount to an admission, that the name of every endorser was authentic: *Hankey v. Wilson*, *Say.* 223. An offer made by the acceptor to pay the bill with certain names on it, is a sufficient admission to supersede the necessity of proving the different endorsements: *Lidford v. Chambers*, 1 *Stark.* 326; *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43.



If the bill be payable to the order of several persons in partnership, it is in general necessary to prove the partnership and handwriting of some member of the firm, or of an agent acting in their name. Where several persons sue as endorsees of a bill of exchange, if the bill [\*239] be endorsed in \*blank, that is, generally, the holders, whoever they may be, are, as such, entitled to recover, and there is no necessity for their proving that they were in partnership together, or that the bill was endorsed or delivered to them jointly, *Rordasnz v. Leach*, 1 Stark. 448; *Ord v. Portal*, 3 Camp. 239; but, when a bill is endorsed specially, the promise being only to pay a certain firm, strict evidence must be given that the firm consists of the persons who are plts.: *ib.* And, if a note be payable to a firm of A. B. and Co., and A. B. and C. D. sue thereon, they must prove that they were the component members of the firm at the time the note was given: *Waters v. Paynter*, cited *Chit. B.* 389. Where a bill of exchange is, by the direction of the payee, endorsed in blank, and delivered to A. B. and Co., who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors, A. and B., two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the endorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise: *Machell v. Kinnear*, 1 Stark. 499. In proving partnership, the plt.'s counsel may suggest to the witness the names of the firm: *Acerro v. Petroni*, 1 Stark. 100.

*Mode of Proof of Endorsements.*] The endorsements should be proved by proving the handwriting of the parties, *ante*, 276, and the endorser may be called for that purpose, *Richardson v. Allen*, 2 Stark. 334, *Hobson v. Rich*, *Chit. B. ib.* 396; as also to prove the consideration given by the plt.; and he may be called after other witnesses for the plt. have negatived it: *ib.* If there was a subscribing witness to the endorsement, he should be called: *Stone v. Metcalf*, 1 Stark. 53.

A promise by defendant to pay, *Hankey v. Wilson*, *Say*. 233, or offer to renew, *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43, made to the endorsee, is a sufficient admission to dispense with proof of the endorsement: *Sidford v. Chambers*, 1 Stark. 326; *ante*, 277. An admission by the endorser himself of his endorsement, will not suffice: *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43; *Sidford v. Chambers*, 1 Stark. 326. The payment of money into court generally, on the whole declaration, amounts to an admission of the endorsement, and dispenses with the necessity of proving it, *Gutteridge v. Smith*, 2 *H. B.* 374, after proving the payment into court, *Israel v. Benjamin*, 3 *Camp.* 40. See "*Rule of Court.*"

*Identity.*] In general, it is unnecessary to prove the identity of the persons by whom the endorsements were made; and proof that they were endorsed by a person of the same name as the person intended, will, *prima-facie*, suffice: *Bulkeley v. Butler*, 2 *B. & C.* 444, *ib.*; *Mead v. Fount*, 4 *T. R.* 28. But, if there be any doubt whether the transfer were made by the proper party, the witness who is to prove the endorsement, or some other person, should be prepared to prove the identity of the party: *ib. Chit. B.* 391. In an action by the endorsee

against the acceptor of a bill of exchange, whereof E. S. was the payee, the plt. proved, that a person, calling himself E. S., came to C., having in his possession the bill in question, and also a letter of introduction (proved to be genuine), which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plt., endorsed to him the bill in question, and received value for it, and also a letter of credit. Held, that this was evidence of the identity of this person with E. S., the payee of the bill, and, in the absence of any evidence, an answer sufficient to justify a verdict for the plt.: *Bulkley v. Butler*, 2 B. & C. 434.

\*ENDORSEE AGAINST DRAWER.

[\*290]

*Proof of Drawing the Bill.*] Plt. must produce and prove the bill, as *ante*, 274. The deft.'s handwriting to the drawing must be proved, *ante*, 276; and, as to proof when drawn by an agent, or partnership, *ante*, 276.

*Proof of Endorsement.*] The plt. must prove his title by evidence of the endorsement of the deft. or the payee; and, as to such proof, see *ante*, 287 to 289.

*Proof of Acceptance.*] In an action against the drawer or endorser, for default of payment by the drawee, his acceptance of the bill need not be proved, and this, although it has been stated unnecessarily in the declaration:—*Tanner v. Bean*, 4 B. & C. 312; 6 D. & R. 338, s. c.; overruling *Jones v. Morgan*, 2 Camp. 474.

*Proof of Presentment for Acceptance, and Default Acceptance.*] When a bill is payable at so many days after sight, the plt. must prove a presentment for acceptance: *O'Keefe v. Dunn*, 1 Marsh. 616; 6 Taunt. 305; 5 M. & S. 28, s. c. But, in other cases, it is sufficient to prove a presentment for payment when the bill becomes due, and a refusal to pay: *B. N. P.* 269; 3 East, 483; *Chit. B.* 405. If the bill has been refused acceptance, though it was unnecessary to present it, *ib.*, the holder cannot, in general, recover, unless he has pursued a line of conduct, as giving notice, &c., as hereafter mentioned.

No certain time is fixed within which a presentment for acceptance of a bill payable at sight, or so many days after sight, must be made; but it should be made with due diligence, and within a reasonable time: *Muilman v. D'Eguino*, 2 H. B. 565. What shall be deemed a reasonable time must depend upon the particular circumstances of each case: keeping it a whole day, exclusive of the day of receiving it, without negotiating it, or sending it for acceptance, is not necessarily an unreasonable delay: *Fry v. Hill*, 7 Taunt. 397. No delay warranted by the common course of business is improper; nor is any delay which is occasioned by keeping the bill in circulation at a distance from the place where it is payable; but a delay by locking it up for any length of time is: *Muilman v. D'Eguino*, 2 H. B. 565, 570. If a bill payable abroad at a certain time after sight is taken in a course of negotiation, it is not necessary to send it by the first opportunity to the place where it is paya-

ble: *ib.* Upon a presentment for acceptance, the bill should be left with the drawee twenty-four hours, unless, in the interim, he either accept or declares a resolution not to accept: 1 *Ld. Raym.* 281; *Bayl.* 182, 6. The reasonableness of the time appears to be a mixed question of fact and law, *Darbishire v. Parker*, 6 *East*, 3; though in *Fry v. Hill*, 7 *Taunt.* 397, it was left to the jury.

A presentment of acceptance should be made at a seasonable time; and if, by the known custom of any place, bills and notes are only payable within limited hours, a presentment there out of those hours is unseasonable; and so is a presentment out of the hours of business to a person of a particular description, as a banker, in a place where, by the known custom of that place, all persons of his description begin and leave off business at stated hours: *Parker v. Gordon*, 7 *East*, 385; *Elford v. Tred*, 1 *M. & S.* 28. But, to a drawee not so circumstanced, eight o'clock in the evening is not an unseasonable hour for making a presentment: *Barclay v. Bailey*, 2 *Camp.* 527; *Morgan v. Davidson*, 1 *Stark.* 114, *post*, 294. And no objection can be made to a presentment on the ground of its being at an unseasonable hour, [\*291] \*if a person is stationed there at the time to give an answer: *Garnett v. Woodcock*, 1 *Stark.* 476; *Henry v. Lee*, 2 *Chit. Rep.* 124. Therefore, a presentment at a banker's out of the usual hours will be unobjectionable, if the banker, or any agent on his behalf, is there at the time of such presentment: *ib.* *Bayl.* 180. A neglect to make a presentment in proper time may be excused by illness, or by the circumstance of war having been declared, or from the political state of the country, or by other reasonable cause or accident not attributable to the laches or misconduct of the holder: *Chit. B.* 163.

Where proof of presentment for acceptance is necessary, it should be shown that such presentment was made to the drawee himself, or to his authorized agent: *Check v. Roper*, 5 *Esp. Rep.* 175. The bill may be left with him twenty-four hours, unless, in the interim, he refuse to accept, see *Ingrum v. Foster*, 2 *Smith's Rep.* 243, *Com. Dig. Merchant, F. 6*, *Bellasis v. Hester*, 1 *Ld. Raym.* 281; or unless, in such interim, a post go out: *ib.*, *Marius*, 62. If the drawee has left the kingdom, a presentment at his house will suffice, *Cromwell v. Hyrison*, 2 *Esp. Rep.* 511, 4 *M. & S.* 48; unless he have a known agent, when it should be presented to him: *ib.*, 2 *Taunt.* 206. On the death of the drawee, the bill should be presented to his personal representatives, if they live in a reasonable distance: *Molloy, b. 2, c. 10, s. 34*. If the drawee has absconded, or cannot be found at the place addressed to him, the bill is dishonoured, and, upon due notice given, the drawer and other parties may be sued, *infra*, 1 *Ld. Raym.* 743; but a mere removal of the drawee, without diligent and continued search to find out where he has gone, will not be deemed a default acceptance. Plt. must show every possible inquiry was made: *Collins v. Butler*, 2 *Str.* 1087; *Gow*, 81. See further, as to what will excuse a presentment, *post*, 292. It is sufficient for the plt. to show that the drawee refused to accept the bill generally, or according to the tenor of the bill: *Boehm v. Garcias*, 1 *Camp.* 425, *n.* The refusal may be proved by a person who presented the bill for acceptance.

*Notice of Default Acceptance.*] If a bill, whether it were necessary to present it or not, has been presented for acceptance, and the drawee has refused acceptance, or made a conditional, partial, or varying one, a notice of that fact should be proved to have been given within a reasonable time after to the persons to whom the holder means to resort for payment, or they will be discharged, *Bridges v. Berry*, 3 *Taunt.* 130, 16 *East*, 42, *Chit. B.* 197; and, in such case, it will not suffice for the holder to wait till the time mentioned in the bill for payment has elapsed, and then to give notice of non-acceptance, as well as of non-payment: *Roscow v. Hardy*, 2 *Camp.* 458; 12 *East*, 434, s. c.; *Chit. B.* 197. A bona-fide holder, however, to whom a bill has been transferred after a refusal to accept, is not affected by the neglect of any previous holder in giving notice of that fact: *Crossly v. Ham*, 13 *East*, 498. As to the mode of giving a notice of dishonour, *post*, 294. A want of effects of the drawer in the drawee's hands, at the time of making the bill, till presentment and dishonour, will excuse the want of a notice of dishonour; and see further, *post*, 295. The bill being on a wrong stamp will also excuse it, 4 *Taunt.* 288; and the drawer may, by his conduct or agreement, dispense with it. And see further as to what will do so, *post*, 296. As to what is a waiver of presentment and notice, *post*, 292, 295.

*Protest for Default Acceptance.*] Whenever notice of non-acceptance of a foreign bill is necessary, a protest is so likewise: *Rogers v. Stephens*, 2 *T. R.* 713; and see further as to proof of protest, *post*, 295. By 3 and 4 *Anne*, c. 9, s. 4, inland bills of £5 and upwards may be protested for non-acceptance; and see, *post*, 295.

*Presentment for Payment.*] When the drawer is sued for default of \*payment of the bill by the drawee or acceptor, a [\*292] presentment for such payment must be proved, and that at the time when the bill fell due, according to the time specified in the bill, or, if no such time be specified, then within a reasonable time after receipt of the bill: *Poth. Pl.* 129; *Cowley v. Dunlop*, 7 *T. R.* 581. A neglect to do this discharges the drawer or endorsers, whose implied contracts are to pay only on default of the drawee, 2 *Burr.* 669; and it discharges them, not only from payment of the bill, but even from the original consideration for endorsing it: *Chit. B.* 245.

*Proof of Excuse of Presentment for Payment.*] A presentment for payment will be excused, as far as respects the drawer's liability, by proof of the drawee's not having had effects of the drawer in his hand from the time of drawing the bill to the time it became due: *Cary v. Sett*, 3 *B. & A.* 619; *Claridge v. Dalton*, 4 *M. & S.* 229; 12 *East*, 171; *Leach v. Hewitt*, 4 *Taunt.* 733. If, at any time between that time, the drawee had some effects of the drawer in his hands, though insufficient to pay the amount, or though the drawer has afterwards withdrawn such effects, there will be no excuse for laches in presenting for payment, &c.: *Orr v. Maginnis*, 7 *East*, 359. And, if the drawer of a bill, when presented for acceptance, has effects in the drawee's hands, though he is indebted to them in a much larger amount, and, they, without his privity, have appropriated his effects in their hands to the satisfaction of their debt, he is discharged by the holder's laches: *Blackman v. Doren*, 2 *Camp.* 503. Nor is it essentially necessary that the drawee

should have actual value from the drawer in hand; for circumstances may exist which would give a drawer good ground to consider he had a right to expect payment from the drawee: *Chit. B.* 208; *Legge v. Thorpe*, 16 *East*, 43; 3 *Camp.* 217, 334, *s. c.*; *Claridge v. Dalton*, 4 *M. & S.* 228; *Spooner v. Gardner, R. & M. C. N. P.* 84; 2 *Esp. Rep.* 515; 2 *V. & B.* 240. Although no consideration passed between the payee and drawer, it is not an accommodation bill as to the latter, if there was a valuable consideration as between the payee and acceptor: *Scott v. Lifford*, 1 *Camp.* 246. It has been held, that where a bill has been drawn for the payee's accommodation, and the drawer had no effects in the drawee's hands, though the payee had, the drawer is not discharged by *laches*: *Walwyn v. St. Quintin*, 1 *B. & P.* 652; 2 *Esp. Rep.* 515, *s. c.*; *sed quære*, see *Chit. B.* 200, and cases there cited; and see further, *ib.* As to how a party guaranteeing a bill is discharged by *laches*, *Chit. B.* 203-4, &c.

The bankruptcy or known insolvency of the drawee will constitute no excuse for not presenting for payment, see *Russell v. Langstaffe*, *Doug.* 497, 515, *Esdaile v. Sowerby*, 11 *East*, 114, *ex. p. Wilson*, 11 *Ves.* 412, 2 *B. & P.* 279, and see *Camidge v. Allenby*, 6 *B. & C.* 373, *Beeching v. Gower*, *Holt*, 313; nor will the circumstance of his being in prison, *Haynes v. Birks*, 3 *B. & P.* 601; nor will his death, *Poth. Pl.* 146. In general, in the case of country bank-notes payable on demand, although the bank has stopped payment, and been shut up, and declared that they will not pay any notes, yet a presentment for payment at the bank must be formally made, unless dispensed with, *Bowes v. Howe*, 5 *Taunt.* 39; but it may be dispensed with: see *Chit. B. Addenda to p. 246, n.* The circumstance of the drawer having notice, before the bill is due, that it will probably not be paid, and promising the holder that he will endeavour to provide effects, and see him again, will not excuse the neglect to present the bill for payment to the drawee on the day the bill is due, *Brideaux v. Collier*, 2 *Stark.* 57, though it might excuse the notice of dishonour: *ib.*; and see *Hill v. Heap, D. & R. C.* 57; *Phipson v. Kneller*, 4 *Camp.* 285. The circumstance of the holder having received the bill very near the time of its becoming due, constitutes no excuse for presentment of it at maturity: *Anderton v. Beck*, 16 *East*, 248.

\*Proof of an acknowledgment by the drawer of his liability, or [\*293] a promise by him to pay, will dispense with the proof of presentment. See *post*, 296, as to when such acknowledgment or promise will supersede the necessity of proving a notice of dishonour. The deft. may, by agreement, waive the necessity of a presentment: *post*, 296.

*Proof by and to whom Presentment for Payment was made.*] The presentment should in general be proved to have been made by the holder of the bill, &c., or some agent competent to give a legal receipt for the money: *p. Ld. Kenyon*, *Coore v. Calloway*, 1 *Esp. Rep.* 115. If the holder, at the time the bill becomes due, is dead, his executor, though he have not proved the will, must present it: *Poth. Pl.* 146; *Malloy, b. 2, c. 10*; *Pl.* 24. A presentment by a person in possession of a bill payable to his own order is sufficient: 10 *Mod.* 286.

The presentment must be in general to the person on whom it is drawn. But it is not necessary that the demand should be personal; it is sufficient to make it at the house of the acceptor, *Brown v. M'Dermont*, 5 *Esp. Rep.* 265-6, or place appointed by him for payment, *Giles v. Boune*, 2 *Chit. Rep.* 300, *Saunderson v. Judge*, 2 *H. B.* 509, or, in some cases, of his agent; as, if the drawee of a bill goes abroad, leaving an agent here, with power to accept bills, and he do so, it must be presented to the agent for payment if the drawee continue absent: *Phillips v. Astling*, 2 *Taunt.* 206. If a note or bill is payable at a particular house, it should be there presented: *Ambrose v. Hopwood*, 2 *Taunt.* 61; *Bayl.* 175. We have seen what acceptance of a bill renders it necessary to present it at a particular place, *ante*, 286. If the particular place be mentioned in the body of a note, a presentment there is necessary, even to charge the maker, *Sanderson v. Bowes*, *Bayl.* 175; and so, if it be printed on the note, by way of memorandum only: *ib.*, *Dickerson v. Bowes*, 16 *East*, 110; but, where a particular house is mentioned in a note by way of marginal memorandum only, presentment at that house may not be necessary to charge the maker: "*Bayl.* 178; *Wild v. Rennards*, 1 *Camp.* 425. If a banker's note be made payable in the country or in London, the holder may present it at either; and, if payment be refused at London, it is no defence to show, that, if payment had been demanded in the country the note would have been paid: *Beeching v. Gower*, *Holt*, 313. Where a bill or check is payable at a banker's, a presentment to their clerk at the clearing-house is sufficient: *Reynolds v. Chettle*, 2 *Camp.* 596; 2 *H. B.* 509. And, if the banker is himself the holder, it is sufficient for him to see whether he has effects in his hands: *ib.* If the drawee has merely removed from the place in which the bill represents him to reside, it is incumbent on the holder to use every reasonable endeavour to find out whither he hath removed, and to present it at that place: *Bateman v. Joseph*, 2 *Camp.* 461; 12 *East*, 433, *s. c.*; *Str.* 1087. But, if the drawee has absconded, or never did live at the place of address, that will be a sufficient excuse to the holder for not making further inquiries after him: *Anon.* 1 *Ld. Raym.* 743; *Bayl.* 173. If, on a presentment, it appears that the drawee or maker is dead the holder should inquire after his personal representative, and, if he lives within a reasonable distance, present the bill or note to him: *Bayl.* 174. If there be no representative, payment should be demanded at the house of the deceased: *Poth. Pl.* 146; *Marius*, 134. The bill, unless paid, must not be left with the acceptor; and, if it be left, the presentment is not considered as made until the money is called for: *Hayward v. Bank of England*, 1 *Str.* 550; *Russell v. Hankey*, 6 *T. R.* 13.

*Proof of Time of Presentment for Payment.*] We have already seen at what time a presentment for acceptance should be proved to have been made, and much of what is there said will apply here: *ante*, 290-1. \*The question as to the correct time for presentment is for the opinion of the court, and not of the jury: *Bayl.* 103; *Chit. B.* 262. The time of presentment for payment must depend on the time the bill is made payable in. When a bill is payable at usance, or at a certain time after date or sight, or after demand, it is not payable at the precise time mentioned in the bill, days of grace being allowed;

and presentment should in such cases, be made on the last day of grace : see *Brown v. Harraden*, 4 T. R. 141; *Leftley v. Mills*, *ib.* 170. In bills payable on demand, no such days of grace are allowed: *Chit. B.* 263. As to when bills fall due, see *Chit. B.* 263 to 276, *a.* A presentment before the bill falls due is a nullity: *Wiffen v. Roberts*, 1 *Esp. Rep.* 262. When a bill is payable on demand, the presentment must be made in a reasonable time after the receipt of it, in order to charge the drawer or endorser, *Bayl.* 103; and, as to what is such reasonable time, see *ante*, 290, *Chit. B.* 270, &c., and that is a question for the court, *ib.*, *post*, 298.

As to the *time of day* when the presentment should be made, it must be a reasonable time before the expiration of the day the bill falls due. By the known custom of any place or trade, a bill must be presented within limited hours, as, in the case of bankers, &c., before five o'clock, or the usual hour of their shutting up: see *Parker v. Gordon*, 7 *East*, 385; *Elford v. Teed*, 1 *M. & S.* 28; *Jameson v. Swinton*, 2 *Taunt.* 224; 2 *Camp.* 374; *Chit. B.* 277. No inference is to be drawn from the circumstance of the bill being presented by a notary in the evening that it had been before duly presented within the banking hours: *Elford v. Teed*, 1 *M. & S.* 28. The presentment of a bill payable at the office of an attorney is sufficient, though made at 8 o'clock in the evening in February, *Trigg v. Newnham*, 1 *C. & P.* 631, and see *Barclay v. Bailey*, 2 *Camp.* 527, 2 *Taunt.* 224, 2 *Camp.* 374, *s. c.*, *Holt*, C. 476, *Morgan v. Davison*, 1 *Stark.* 114, will suffice, if made to an authorized person: *Garnett v. Woodcock*, 1 *Stark.* 475, 6 *M. & S.* 44, *s. c.*: see further, *ante*, 290-1.

*Proof of Notice of Dishonour and Protest.*] A notice of dishonour ought to be proved to have been given, or in general, the drawer and endorsers will be discharged from liability. What has been already said as to the necessity of giving a notice of dishonour in the case of a non-acceptance, and what will excuse the want of it, or a want of presentment, will apply here, *ante*, 291-2. When a bill has been dishonoured by a non-acceptance, and due notice thereof given, it is not absolutely necessary to give a notice of a dishonour by the non-payment of it when due, *Chit. B.* 309; and, after a regular notice of non-payment to the drawer, the engagement of the holder to present the bill again, and his doing so, but omitting to give notice of the second dishonour, will not prejudice his remedy against the drawer: *Forster v. Jurdison*, 16 *East*, 105. No proof of notice will be required, where the acceptor is also one of the drawers of the bill: *Posthouse v. Parker*, 1 *Camp.* 82.

It is necessary, in all cases where a notice of dishonour is necessary, to prove also a *protest* of a *foreign* bill, *Gale v. Walsh*, 5 *T. R.* 239; a mere notice of the bill, without proof of protest, will not be sufficient: *Rogers v. Stephens*, 2 *T. R.* 713; *Gale v. Walsh*, 5 *T. R.* 239; *Orr v. Magennis*, 7 *East*, 459. A foreign bill should be noted for non-acceptance or non-payment on the day on which acceptance or payment is refused, *Leftley v. Mills*, 4 *T. R.* 174; but it would seem that the protest may be formally drawn up at any future period, provided that, in the event of a suit, it be drawn up before the commencement of such suit: *Chaters v. Bell*, 4 *Esp. Rep.* 48; *Bayl.* 217. No protest need

be proved on a foreign bill, where the drawer or endorser comes to England previous to its dishonour, in which case a notice to him will be sufficient, for he has the means of making inquiry as to the protest: *Cromwell v. Hynson*, 2 *Esp. Rep.* 511; *Robins v. Gibson*, 1 *M. & S.* 288; 3 *Camp.* 334, *s. c.* Proof of protest on a \*foreign [\*295] bill may, however, be dispensed with in some cases, as, where there are no effects, &c., *Legge v. Thorpe*, 2 *Camp.* 310, 12 *East*, 171, *s. c.*; or by a subsequent promise, as, where the drawer, on being made acquainted with the dishonour of the bill, said, that his affairs were in a deranged state, but that he would be glad to pay it as soon as certain accounts with his agent were settled: *Gibbon v. Goggan*, 2 *Camp.* 188; *Greenway v. Hindley*, 4 *Camp.* 52; and see *infra*. There is no occasion to prove a protest of an inland bill, *Windle v. Andrews*, 2 *B. & A.* 696; "though it may be made on the non-acceptance of an inland bill, if such bill is for the payment of £5 or upwards, within a limited time after date, and the value is expressed therein to have been received, or after an acceptance written upon such a bill for its non-payment," *Bayl.* 210; but a protest cannot properly be made on any other inland bills: *Leftley v. Mills*, 4 *T. R.* 170. And a protest is never necessary upon an inland bill, where it is for the payment of less than £20; and on such as are for the payment of more, though the 3 and 4 *Anne*, c. 9. s. 5, contain words which, *prima-facie*, import, that a neglect to procure it would preclude the holder from recovering against the persons entitled to notice any special damages or costs occasioned by the non-acceptance or non-payment of interest, yet it hath not, generally, that effect, *Bayl.* 214. Interest may, however, be recovered, without proof of protest: *Windle v. Andrews*, 2 *B. & A.* 696; 2 *Stark.* 425. It seems to be undecided whether, if the protest of an inland bill be alleged, it is necessary that it should be proved: *Boulanger v. Talleyrand*, 2 *Esp. Rep.* 550.

The mere production of the protest, attested by a notary public, without proof of the signature or affixing of the seal, will, in the case of a bill payable and protested out of this country, be evidence of the dishonour of the bill, 12 *Mod.* 345, *Holt*, 297; and to it all foreign courts give credit, *Molloy*, 281, *Da Costa v. Cole*, *Skin.* 272, *pl.* 1; but such mode of proving a protest made in this country will not suffice: in that case it must be proved by the notary who made it, and by the subscribing witness, if any: *Chermer v. Noyes*, 4 *Camp.* 129; *post*, "Public Documents."

*Proof of Excuse for not adducing Proof of Notice or Protest.*] Plt. may show as a reason for his not giving notice to the deft. or for not protesting a foreign bill, that the drawer had no effects in the hands of the drawee, whereby to satisfy the bill; and as to which, see *ante*, 292.

Plt. may prove, as an excuse for not giving notice, that he was ignorant of, and used due diligence to discover, the drawer's residence, but failed: *Phipson v. Kneller*, 1 *Stark.* 116; 4 *Camp.* 285, *s. c.*; *Bateman v. Joseph*, 12 *East*, 433; *Baldwin v. Richardson*, 1 *B. & C.* 245. Merely inquiring at the house where a bill is payable, is not due diligence for finding out an endorser: *Beveridge v. Burgis*, 3 *Camp.* 262; *Bayl.* 229. Inquiry should be made of some of the other parties to the



bill, and of persons of the same name, *ib.*; and, if a party when he passes a bill, declines saying where he lives, and undertakes to call upon the acceptor, to see if the bill is paid, he cannot complain of want of notice: *Phipson v. Kneller*, 4 *Camp.* 285. A mistake in directing a letter is no excuse: *Esdaile v. Sowerby*, 11 *East*, 114. Where a party cannot be discovered in the regular time, and afterwards is discovered, notice, it seems, should be given the next day after such discovery; and, as to what is evidence of notice not being given on that day, see 2 *C. & P.* 300: *quære*, whether reasonable diligence is a question for a jury or the court: 1 *Wightw.* 76; 12 *East*, 433; 2 *Camp.* 461; *ante*, 294; *post*, 298.

Proof of the sudden death or illness of the holder, or his agent, or other accident, will afford no excuse for not giving a regular notice; the notice in that case must be given as soon as possible after the impediment is incurred: *Turner v. Leach*, *Chit. B.* 212. Absence on account of the illness of the holder's wife, will not supersede the proof of [\*296] regular notice, *ib.*; but see \**Hilton v. Shephard*, 6 *East*, 15. The loss or destruction of an accepted bill affords no excuse for not giving due notice: *Poth. Pl.* 125; 3 *Camp.* 164.

In case of bankruptcy of the drawee or endorser, notice of the dishonour must be given to the bankrupt, or his assignee: *Goldsmith v. Bland*, *Bayl.* 127; 1 *M. & S.* 545. Where a bankrupt endorser's house continued open, and the messenger of the assignees was in it, it was considered that notice of the dishonour should have been left there: *Rohde v. Proctor*, 4 *B. & C.* 517; 6 *D. & R.* 610, *s. c.* It is not settled whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavour to find out the assignees at all events: *Chit. B.* 214.

Proof of regular notice in the usual time will be dispensed with, by proof that the day on which notice should have been given, was a Sunday, Good Friday, or Christmas Day, or other day within the 7 and 8 *G. 4. c.*; or a public festival, on which the holder was strictly forbidden by his religion to attend to any secular affairs, *Lindo v. Mesworth*, 2 *Camp.* 602; or by proof that the political state of the country rendered it impossible to give the notice: *Patience v. Townly*, *Smith's Rep.* 223.

Proof of an *acknowledgment* by the drawer, that the bill would not be paid, supersedes proof of notice of its dishonour; *Butt v. Levett*, 13 *East*, 213. So, evidence of a *promise*, as a letter from the drawer, after the bill was due, stating that the bill would be paid "before the following term," *Wood v. Brown*, 1 *Stark.* 217, and part payment of a bill by the drawer, after it has become due, furnishes a ground for presumption, that notice has been given: *Horford v. Wilson*, 1 *Taunt.* 12; *Vaughan v. Fuller*, 2 *Str.* 1246; *Bayl.* 234. Evidence of an agreement between a prior endorser and the deft., after the bill became due, that the former should take the money due to him upon the bill by instalments, was held to render it unnecessary to prove notice of the dishonour, as it established the deft.'s liability: *Gunson v. Metz*, 1 *B. & C.* 193; 2 *D. & R.* 334, *s. c.* A promise to pay the bill, if the holder would call again, dispenses with proof of notice, *Lundie v. Robertson*, 7 *East*, 231; but a mere offer of compromise will not be suffi-

cient, without proof of notice, *Cuming v. French*, 2 *Camp.* 106, n.; nor a promise to pay, if the party was bound to do so by law, *Dennis v. Morrice*, 3 *Esp. Rep.* 158; nor an agreement between the parties not to put the bill in suit till certain estates were sold: *Free v. Hawkins*, 8 *Taunt.* 92; *Holt*, 550, s. c. But, where the drawer and endorser of a bill of exchange entered into a bond to pay the bill within one month after it became due, if it were not paid by the acceptor, it was held, no notice of dishonour was requisite: *Murray v. King*, 5 *B. & A.* 165; *Soward v. Palmer*, 2 *Moore*, 274. A promise to pay, after full notice of the default, sufficiently evinces that the party could not have sued on the bill, and, consequently, that he cannot insist on want of notice, or of a neglect to present: *Rogers v. Stephens*, 2 *T. R.* 713. A payment or promise, without notice of the default, does not: *Blissard v. Hirst*, *Burr.* 2670; *Goodall v. Dolley*, 1 *T. R.* 712; *Bayl.* 235. A promise made by deft. at the time of his arrest, and when he was ignorant of the circumstances attending the dishonour, will not dispense with notice: *Rouse v. Redwood*, 1 *Esp. Rep.* 155; 4 *Taunt.* 93.

*Proof of Mode of giving Notice of Dishonour.*] No precise form of words need be used in giving a notice of dishonour; any act of the holder, signifying the refusal by the acceptor or drawee, will be sufficient. The notice, however, should be explicit, and show what the bill is, and that the acceptance or payment of it has been refused, and must not be calculated in any way to mislead the party. A letter merely containing a demand of payment is insufficient, *Hartley v. Case*, 4 *B. & C.* 339, 6 *D. & R.* 505, s. c.; so is a notice, stating the bill to have been drawn by the party, when, in fact, he was not the drawer, but only an endorser: \**Beauchamp v. Cash*, *D. & R. C. N. P.* [\*297] 5. It is not necessary to prove the notice to have been made in writing: *Cross v. Smith*, 1 *M. & S.* 545. Personal notice is not absolutely necessary: *ib.* Proof of a reasonable endeavour on the part of the holder to give notice will be sufficient; as, by sending a person to the drawer's country house, who repeatedly knocked at the door, but failed in his object: *ib.* Proof of notice having been sent by the post, will, at all times, be sufficient, if it appear to have been so sent the day after the dishonour of the bill: *Williams v. Smith*, 2 *B. & A.* 500, *Jameson v. Swinton*, 2 *Taunt.* 224; though proof of the letter containing the notice having been received is not necessary, *Saunderson v. Judge*, 2 *H. Bla.* 509, if it be proved to have been put into the proper post-office, or sent by the twopenny post: *Scott v. Lifford*, 9 *East*, 347; 1 *Camp.* 246, s. c. And, in the case of foreign bills, the sending the notice by post has been held to be sufficient: *Saunderson v. Judge*, 2 *H. Bla.* 509; *Darbishire v. Packer*, 6 *East*, 3. It must appear that the letter conveying the notice was sent by the post in time to be delivered to the party within the period of legal notice: *Smith v. Mullett*, 2 *Camp.* 208; *Hilton v. Fairclough*, *ib.* 633. Proof of the letter being left at deft.'s house will be sufficient: *Stedman v. Gooch*, 1 *Esp. Rep.* 5. If notice be sent by the post, the letter must not be too generally directed: *Walter v. Haynes*, 1 *R. & M.* 149. It has been held sufficient to direct the letter similarly to the date of the bill; as, where it was dated Manchester, and the letter was so directed: *Mann v. Moors*, *ib.* 249.

The notice may also be sent by a private conveyance, *Bancroft v. Hall, Holt, C.* 476; or, where there is no post, sending it by an ordinary conveyance, as, by the first regular ship bound for the place where the notice is required to be given: *Muilman v. D'Eguino*, 2 *H. Bla.* 565; *Darbishire v. Parker*, 6 *East*, 7. And, in a case where a bill was drawn in Jamaica in favour of A., who remained there after its dishonour, proof that notice was left at his residence in England was held sufficient: *Cromwell v. Hynson*, 2 *Esp. Rep.* 511. Proof of any form of notice will be sufficient, its object being to apprise the party that the holder intends to require payment from him: *Tindal v. Brown*, 1 *T. R.* 167. Proof of a notice to one of several partners has been held sufficient to render the partnership liable: *Porthouse v. Parker*, 1 *Camp.* 82. Where the notice itself could not be produced, parol evidence of its contents has been admitted; and a notice to produce the notice of dishonour in the hands of the deft. does not seem necessary: *Acland v. Pearce*, 2 *Camp.* 601; but see *Langdon v. Hulls*, 5 *Esp. Rep.* 156; *Shaw v. Markham*, *Pea. Rep.* 165. The notice may be proved by showing a copy of it, kept at the time it was sent: *Kine v. Beaumont*, 3 *B. & B.* 288; *Roberts v. Bradshaw*, 1 *Stark.* 28. And proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the deft. upon the dishonour of a bill, together with proof of notice to produce the letter so delivered, as containing notice of the dishonour, is evidence on default of production that deft. had notice: *ib.*

*Proof of Time when Notice given.*] The general rule as to the time of giving notice is, that each party has a day for giving it; therefore, if the parties live in the same town, notice should be given the next day, *Smith v. Mullett*, 2 *Camp.* 208; if in different places, by the next day's post: *Williams v. Smith*, 2 *B. & A.* 497. And notice by a letter put into the twopenny post-office, after five o'clock in the afternoon of the day after that on which the party knew of the dishonour, was held insufficient: *ib.* And a party receiving a notice of dishonour need not give notice to the party above him, although he might easily give it, that day, and there is no post the day following: *Geill v. Jeremy*, 1 *M. & M.* 61. And he will be entitled to the whole day, though the post by which he is to send it goes out within the day: *Bayl.* 220; *Bray v.*

*Hadwen*, 5 *Maule*, 68. Notice of dishonour may be given [\*298] immediately on the refusal to pay, without \*waiting to see whether the bill will be taken up in the course of the day, *Burbridge v. Manners*, 3 *Camp.* 193; unless the acceptor afterwards, and on the same day, pays the bill: *Hartley v. Case*, 1 *C. & P.* 556. Where the party receives notice on a Sunday, Good Friday, or Christmas Day, he is in the same situation as if it did not reach him till the next day, *Bray v. Hadwen*, 5 *M. & S.* 68, *Bayl.* 220, 21; and see 7 and 8 *G. 4, c.*; or on a day of similar sanctity, according to the religion of the party bound to give notice: as, where notice was given to a Jewish endorser on the 8th, which was a great Jewish festival, it was held that it was not necessary for him to give notice by the general post till the 9th: *ib.*, *Lindo v. Unsworth*, 2 *Camp.* 602. Where the holder received notice of the dishonour on Sunday, notice given by him by the Tuesday's post was held to be sufficient: *Wright v. Shawcross*, 2 *B. & A.*

501. If the holder of a bill or note place it in the hands of his banker, the banker is only bound to give notice of its dishonour to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice: *Haynes v. Birks*, 3 B. & P. 599. And the customer has the like time to communicate such notice, as if he had received it from a holder: *ib.* Thus, notice sent by a London Banker to a London customer the day after the dishonour is in time; and, if the customer communicate that notice the day following, that will be in time also: *ib.*, *Bay*, 222.

Where a bill is dishonoured abroad, notice by the first direct and regular mode of conveyance, whether it be an English or a foreign ship, is sufficient. The holder is not bound to send such notice by the accidental though earlier conveyance of a foreign ship: *Muilman v. D'Eguino*, 2 H. Bla. 565. And it is not essential the notice should be sent by the post, where there is one; sending to an agent by a private conveyance, that he may give the notice, will be sufficient, if the agent give the notice, or take due steps for the purpose, without delay: *p. Bay.*, *Bancroft v. Hall*, *Holt*, C. 476.

Though it has been disputed whether it is for the court or for the jury to decide what is a reasonable time for giving notice, it should seem that it is a question partly of fact and partly of law, and that the jury are to find the facts, such as the distance at which the persons live from each other, the course of the posts, &c.; but, when those facts are established, the reasonableness of the time becomes a question of law, and consequently to be determined by the court, and not by the jury: *p. Ld. Mansfield*, *C. J.*, and *Buller, J.*, in *Tindal v. Brown*, 1 T. R. 168; *ante*, 292.

[*Proof as to by whom Notice was given.*] The notice must come from the holder, or some party entitled to call for payment or reimbursement: *Tindal v. Brown*, 1 T. R. 167, 186; *Rosher v. Kieran*, 4 Camp. 87; *Gunson v. Metz*, 1 B. & C. 192. But a notice from the holder, or any other party to the bill, will enure to the benefit of every other party who stands between the person giving the notice and the person to whom it is given: *Wilson v. Swabey*, 1 Stark. 34. Therefore, a notice from the last endorsee to the drawer will operate as a notice from each endorser: *Bayl.* 207; *Chit. B.* 227. A notice of dishonour from the acceptor suffices, *Rosher v. Kieran*, 2 Camp. 273; but notice given by a person not party to a bill without any authority is not sufficient: *Stewart v. Kennett*, 2 Camp. 177. Where, a few days before a bill became due, the acceptor informed the drawer he would be unable to pay it, and told such drawer he must take it up, and gave him part of the amount to assist him in so doing, and the latter promised to take up the bill accordingly, it was held in an action by the endorsee against the drawer, the latter might nevertheless set up as a defence, that the bill was not duly presented, and that he had not regular notice of dishonour, but that the sum paid him by acceptor was money had and received to the plt.'s use: *Baker v. Birch*, 3 Camp. 107.

[*Proof as to whom Notice of Dishonour was given.*] The notice of dishonour, when necessary, must be proved to have [\*299] been given to all the parties to whom the holder of the bill means

to resort for payment: *Brown v. Maffey*, 15 *East*, 216. Where the deft. is a bankrupt, notice should be given to him before the choice of assignees, and, after such choice, to them: see *ex. p. Moline*, 19 *Ves.* 216. If the party be dead, notice should be given to his executors or administrators; and it is expedient, though not, in general, absolutely necessary, to give notice to a person who has guaranteed the payment of the bill: *ante*, 204; *Bayl.* 138-9. When the party entitled to notice is abroad at the time of the dishonour, if he have a place of residence in England, it will be sufficient to leave notice of non-acceptance at that place; and a demand of acceptance or payment from his wife or servant would, in such case, be regular: *Cromwell v. Hynson*, 2 *Esp. Rep.* 511-12.

*Proof under Common Counts.*] As to what the plt. will be at liberty to prove under the common counts, to entitle him to a verdict, see *ante*, 278.

#### ENDORSEE AGAINST ENDORSER, WHO IS NOT DRAWER.

The plt.'s proofs in this action will, for the most part, be similar to those required in an action against the drawer who is also endorser: as to which, see *ante*, 290 to 299.

*Proof of Drawing.*] This is unnecessary, as the endorsement admits the handwriting of the drawer, and deft. cannot even show it is a forgery: *Lambert v. Pack*, 1 *Salk.* 127; 1 *Ld. Raym.* 443, *s. c.*; *Tree v. Rawlings*, *Holt*, C. N. P. 550.

*Proof of Acceptance.*] This is unnecessary, even though it be stated in declaration. See *ante*, 290, *Tanner v. Beau*, 4 *B. & C.* 312.

*Proof of Endorsement.*] The handwriting of all endorsements prior to the deft.'s is admitted by his endorsement, *Lambert v. Pack*, 1 *Salk.* 127, 1 *Ld. Raym.* 443, *Critchlow v. Parry*, 2 *Camp.* 182, *Chaters v. Bell*, 4 *Esp. Rep.* 210; and they need not be proved, although forged, and stated in the declaration: *ib.* But, if a subsequent endorsement be stated, it must be proved; and, for this reason, it is usual to insert a count stating the deft. to have endorsed the bill to plt.: *Bosanquet v. Anderson*, 6 *Esp. Rep.* 43; 1 *Stark.* 326; *Chit. B.* 398.

*Proof of Presentment, and Notice of Dishonour.*] What has been already said on this head, in an action against the drawer, will be, for the most part here applicable: see *ante*, 290 to 299. It is not necessary to prove any presentment to or demand upon the drawer: *Heylin v. Adamson*, 2 *Burr.* 669, 675; *Bromley v. Frasier*, 1 *Str.* 441. It is no excuse for not giving notice to the endorser, that the acceptor had no effects of the drawer: *Wilks v. Jacks*, *Pea. Rep.* 202. Where a bill was drawn for the accommodation of a remote endorsee, and the names of all the prior parties were lent to him, it was holden in an action against one of those parties, an endorser, that the latter was entitled to notice of dishonour; because, upon paying it, he would be entitled to sue such endorsee for repayment: *Brown v. Maffey*, 15 *East*, 216. Proof of a payment of part, or a promise to pay after full notice of the laches of the holder, dispenses with the proof of a due presentment, protest, and

notice, as it admits all these facts, as well as the right of the holder to sue, *Taylor v. Jones*, 2 *Camp.* 105 ; \* *Wilks v. Jacks*, [\*300] *Pea. Rep.* 202 ; like in an action against the drawer, *ante*, 295, *n.* ; and see what promise is sufficient, *ante*, 296. It has, however, been considered, that although a *drawer* of a bill may, by circumstances *impliedly* waive his right of defence, founded on the laches of the holder, yet it must be proved that an *endorser* has *expressly* waived it ; *Borrodale v. Lowe*, 4 *Taunt.* 93, *Chit. B.* 239 ; and, in these cases, it is to be left to the jury to say whether, under the circumstances, the deft. had notice, at the time of his promise or application, that there had been laches in the presentment, &c. : *Hopley v. Dufresne*, 13 *East*, 275 ; *Horford v. Wilson*, 1 *Taunt.* 15. It seems that, at all events, plt. must prove a demand on the acceptor : 5 *Esp. Rep.* 265. The following letter from the endorser has been held not to waive the want of notice : " I cannot think of remitting till I receive the draft : therefore, if you think proper, you may return it to T. and Co., if you think me unsafe : " 4 *Taunt.* 93.

*Proof under Common Counts.*] As to what plt. may prove under the common counts, to entitle him to a verdict, see *ante*, 278.

#### ACCOMMODATION ACCEPTOR AGAINST DRAWER.

The handwriting of deft., as drawer, must be proved, as also the payment by the plt., or some special damage arising from his being obliged to pay the bill, or costs of imprisonment, &c. : *Chilton v. Wiffen*, 3 *Wils.* 12 ; *Hopley v. Dufresne*, 13 *East*, 275. But, to entitle him to recover special damage, there must be a special count, stating it : 3 *East*, 169. Plt. must also prove the want of consideration : *Vere v. Lewis*, 3 *T. R.* 183. Proof of a receipt at the back of the bill, in the handwriting of the party entitled to demand payment, will be sufficient evidence of the acceptor's having paid the bill : *Pfiel v. Van Battenburg*, 2 *Camp.* 439. A general receipt, on the back of the bill, will be sufficient *prima-facie* evidence of payment : *Scholey v. Walsby*, *Pea. Rep.* 25. But, if the bill be produced from the custody of the acceptor, it will not be *prima-facie* evidence of payment, unless it be also proved to have been in circulation after it had been accepted : *Chit. B.* 410, *a.* Nor is payment to be presumed from a receipt endorsed on the bill, unless it be shown to be in the hand-writing of a person entitled to demand payment : 2 *Camp.* 439. There is no occasion to prove the *actual* payment of costs, as the plt.'s liability, by having incurred them, is sufficient : *Bullock v. Lloyd*, 2 *C. & P.* 119. In an action by bankers, to recover the amount of a bill of exchange, accepted by the deft., payable at their house, and paid by them after it was endorsed, they are bound to prove the endorsement by the payee and the deft.'s acceptance, and their payment : *Foster v. Clements*, 2 *Camp.* 17. See *post*, " *Indemnity*," " *Guarantee*."

#### *Evidence for Defendant.*

Under the general issue, the deft. may give any evidence, disproving plt.'s case in general, and that he is not liable on the bill. The usual grounds of defence are *ante*, 258.

If there be any variance in the statement of the bill, and plt. cannot resort to the common counts, he will be non-suited : as to such variance, see *ante* ; as to what may be given in evidence under the common counts, *ante*.

STAMP.] A bill of exchange cannot be given in evidence, 1 *B. & P. N. R.* 30 ; nor is it in any manner available, unless it be duly stamped, that is, not only with a stamp of the proper value, but also with [\*301] a stamp, \*of the proper denomination, or the peculiar stamp appropriated to this species of instrument by the legislature : *Selw. N. P.* 313.

It is, therefore, an usual ground of defence, that the bill has not a proper stamp, according to the table of stamps under 55 *G. 3, c.* 184.

A bill, or note, made abroad, must be stamped according to the law of the country where it is made : *Alves v. Hodgson*, 7 *T. R.* 241 ; *Phil. Ev.* 488. Deft. must, however, prove that a stamp was necessary by the law of such country ; and, for this purpose, an authenticated copy of the law of such country ought to be produced, *ib.*, *Buchanan v. Rucker*, 1 *Camp.* 65 ; and no English stamp is, in the case of such foreign bill, necessary. And a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an English stamp : *Bochen v. Campbell, Goss*, 56. And, where a bill was drawn in Ireland, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negotiated, it was held, that this was to be considered as a bill of exchange, from the time of signing and endorsing it in Ireland, and that an English stamp was not necessary : *Smith v. Mingay*, 1 *M. & S.* 87. So, where a bill of exchange was drawn in Jamaica, upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bona-fide* holder filled in his own name as payee, it was considered that no English stamp was necessary. *Crutchley v. Mann*, 5 *Taunt.* 529 ; 1 *Marsh*, 29, *s. c.* But, if a bill, however, be drawn in England, though dated abroad, it cannot be enforced here without an English stamp : *Jordaine v. Lashbrooke*, 7 *T. R.* 601 ; *Abraham v. Dubois*, 4 *Camp.* 269.

Where it is objected that a bill, purporting to have been made abroad, was made in England, and therefore required a stamp, it will be insufficient merely to prove that the drawer was in England at the time the bill bears date, but the fact must be established by more positive evidence : *Abraham v. Dubois*, 4 *Camp.* 269.

But a Foreign Bill of exchange drawn in, but payable out of Great Britain, if drawn singly, and not in a set, the same duty is payable as on an inland bill of the same amount and tenor. As to foreign bills drawn in sets, according to the custom of merchants, see the tables under 55 *G. 3, c.* 184 ; as to the sums payable for every bill of each set, *Bayl.* 75.

A bill properly stamped, and put into circulation, and afterwards taken up by the drawer, may be circulated again without a fresh stamp, as it continues negotiable till it has been paid or discharged by the acceptor : *p. Ld. Ellenb., Callow v. Lawrence*, 3 *M. & S.* 97.

*What Alteration of a Bill requires a New Stamp.*] If a complete bill be altered in a material point after negotiation, or after it is due, though before negotiation, a fresh stamp is necessary, *Bowman v. Nichol*, 1 *Esp. Rep.* 81, 5 *T. R.* 537; and, though with the consent of all parties, if it has once issued: *Wilson v. Justin*, cited *Bayl.* 89. An alteration, though by a mere stranger, will vitiate the bill: *Master v. Miller*, 4 *T. R.* 320; 2 *H. Bl.* 141. Altering the date or sum, *Waltar v. Hastings*, 4 *Camp.* 223, 1 *Stark.* 215, *Outhwaite v. Limsley*, *ib.* 179, *Bowman v. Nicholl*, 5 *T. R.* 537, time for payment, or inserting words, rendering a bill or note (*Kershaw v. Cox*, 3 *Esp. Rep.* 246) negotiable, which was not so originally, or inserting words in a bill or note, originally expressed to be for value received, generally stating such value to have been received on a (*Knill v. Williams*, 10 *East*, 431) particular account, is a material alteration, and makes a new stamp necessary. And, where the drawer of a bill of exchange accepted generally, since 1 and 2 *G. 4*, c. 78, added the words, "*payable at Ransom and Co., bankers, London*," without the knowledge of the acceptor, and then endorsed it for valuable consideration, the bill being over due, and the endorsee privy to the alteration, it was held that the alteration was "in a material part of the bill, as the right of an [\*302] endorsee to sue his endorser would, according to the altered bill, be complete, upon default made at the banker's, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment: *Macintosh v. Haydon*, 1 *R. & M.* 362; see 1 *Camp.* 82, *n.* But, if the alteration was merely to correct a mistake, and in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp: *Cox v. Kershaw*, 3 *Esp. Rep.* 246. So, a mistake in the date may be corrected: *Bayl.* 92; *Jacobs v. Hart*, 2 *Stark.* 45; *Kennersley v. Nash*, 1 *Stark.* 452; *Walton v. Hastings*, *ib.*, 215. And, where a bill had been dated by mistake 1822 instead of 1823, and the agent of the drawer and acceptor, to whom it had been given to be delivered to the endorsee, without their knowledge or consent, corrected the mistake, it was held that such alteration did not vacate the bill: *Brutt v. Picard*, *R. & M.* 37. Inserting a mere memorandum, to say where a bill is to be payable, if it give a right direction, does not require a new stamp: *Trapp v. Spearman*, 3 *Esp. Rep.* 57. The introduction of words which do not affect the responsibility of the parties, after the bill has been accepted, is immaterial: *Marson v. Petit*, 1 *Camp.* 82, *n.*

"A bill is *prima-facie* to be considered as issued, as soon as it is passed away by the drawer or maker, *Walton v. Hastings*, 4 *Camp.* 223, 1 *Stark.* 215, or accepted by the drawee:" *Bayl.* 93; *Tidmarsh v. Gower*, 1 *M. & S.* 735. An exchange of acceptances is a sufficient negotiation to render a new stamp necessary, *Cordwell v. Martin*, 1 *Camp.* 79, 180, *b. 5*, 9 *East*, 190; and so is the delivery to the drawer of a bill drawn for his accommodation, and payable to his own order: *Calvert v. Roberts*, 3 *Camp.* 342. And the alteration of a bill by the drawee, after it has been drawn and endorsed, and before it is accepted, postponing the time of payment, renders the bill void: *Outhwaite v.*



*Luntley*, 4 *Camp.* 180. But an accommodation bill is not issued so, as to make an alteration fatal, until it is in the hands of a person entitled to treat it as a security available in law: *Downes v. Richardson*, 5 *B. & A.* 674. A bill altered before negotiation, without the consent of the acceptor, may be enforced against him, if he assent to the alteration: *ib.*; *Kennerley v. Nash*, 1 *Stark.* 452; *Jacobs v. Hart*, 2 *Stark.* 45.

Where the alteration is apparent on the face of the bill, on its production in evidence it lies on the holder to prove that the alteration in the bill was made before negotiation: *Johnson v. D. Marlborough*, 2 *Stark.* 313. But proof that it was in the drawer's hands after it was accepted, will be *prima-facie* evidence for that purpose: *ib.*

A protest must be stamped: *Sel.* 812.

[INCAPACITY OF PARTY.] A bill cannot properly be made or endorsed by, nor can it be properly addressed to, any person incapable of making himself responsible for the payment; nor can they be properly made payable or endorsed to any person incapable of suing. Therefore, it is a good ground of defence for the deft. to show that he was an infant, whether he be sued as maker or endorser of a bill, if it be in the course of trade, *Williams v. Harrison*, *Carth.* 160, 3 *Salk.* 197; but not if it were drawn, endorsed, or accepted, for necessities: *Williamson v. Watts*, 1 *Camp.* 552. And, if an infant draw a bill to his own order, and endorse it, and the drawee accept, the acceptance will bind the drawee, and he will be compellable to pay the endorsee; because, by accepting, he precludes himself from disputing the competence of the drawer: *Taylor v. Croker*, 4 *Esp. Rep.* 187; *Bayl.* 39. But it is an unsettled point whether an infant first endorsee can, by such endorsement, give currency to a bill of exchange, so as to entitle the holder to sue on it; though, indeed, in a case where the acceptor knew [\*303] the payee and endorsee was an infant, the \*court held him liable: *Jones v. Darch*, 4 *Price*, 300. As an infant is capable of suing, he may be payee and endorsee; and an objection to his infancy, when he sues as such, will be unavailable: *Teed v. Elworthy*, 14 *East*, 210; *Warwick v. Bruce*, 2 *M. & S.* 205; 6 *Taunt.* 118. The drawing, endorsing, or accepting, a bill by an infant is not void, but only voidable; therefore, his ratification, after he comes of age, will be binding on him: *Bayl.* 40; *Gibbs v. Merrill*, 3 *Taunt.* 307; 2 *B. & C.* 824; 4 *D. & R.* 545; *Taylor v. Croker*, 4 *Esp. Rep.* 187; *post*, "*Infancy*."

*Coverture*, when established, will also be a sufficient ground of defence; as, a married woman cannot be a party to a bill of exchange, so as to charge herself to liability in a court of law, although she be living from her husband, and have a separate maintenance secured to her by deed, *Marshal v. Rutton*, 8 *T. R.* 545; and, though she live apart from her husband, in a state of adultery, and there exist a valid divorce, *a mensa et thoro*, *Lewis v. Lee*, 3 *B. & C.* 291; and a *feme covert*, sole trader, in London, is not liable to be sued as such, in the courts at Westminster: *Beard v. Webb*, 2 *B. & P.* 93. Where a husband, however, has been abroad, and not heard of for seven years, the wife will be liable, as it shall be presumed he is dead: 2 *Camp.* 113, 273. Or, if an alien husband never has been in this country, and his wife reside here,

and contract debts, she is responsible: 3 *Camp.* 124. But, if he has once resided in the country, the *animus revertendi* will be presumed, unless the contrary appear, and she will not be responsible: 3 *Camp.* 124. Though it has been held, that, if a *feme covert* give a promissory note, and after the death of her husband promise to pay it, in consideration of forbearance, such promise is void; yet, if the wife has a separate estate secured to her at the time she gave the note, the promise may be enforced at law: *Lloyd v. Lee*, 1 *Str.* 94. See post, "Coverture."

WANT OF CONSIDERATION. *When a Defence.*] "Where there is a total failure of consideration for the payment of the bill by the deft., it can be insisted on as a total bar to the action, and a partial failure may be insisted on as a bar *pro tanto*: *Bayl.* 328; *Pea. Rep.* 61, 216; 2 *Stark.* 166. Where the contract on which the bill was given is entire, deft. may prove that it was wholly rescinded; or, where there was a partial failure of consideration, that the contract has been partially rescinded, if it consisted of divisible parts, *Bayl.* 394; therefore, it is a good defence to an action on a note, that it was given for an apprentice-fee with deft.'s son, and that the indentures were void for want of a stamp, under 8 *Anne*, even though plt. had maintained the son for a time, as the consideration (the apprenticeship) was entire, and had wholly failed: *Jackson v. Warwick*, 7 *T. R.* 121. So, where deft. accepted the bill, in consideration that plt. would take deft. into partnership, and the treaty was broken off, it was held, that plt. could not recover the whole amount, if he had not sustained an adequate injury: *Ledger v. Ewer*, *Pea. Rep.* 216. And, if goods paid for by a bill are damaged, and the contract is rescinded on that account, no action lies on the bill, *Lewis v. Cosgrave*; 2 *Taunt.* 2; nor does an action lie on a bill given for the price of a horse, warranted sound, if there were a breach of warranty, and the horse were immediately returned, *ib.*; and fraud may be given in evidence by the deft., so as to avoid the contract altogether: *Lewis v. Cosgrave*, 2 *Taunt.* 2; *Solomon v. Turner*, 1 *Stark.* 52. As, where a bill is given for the price of goods fraudulently sold under a warranty, the breach of warranty is a bar to an action on the bill, if the deft., immediately on discovering the fraud, repudiate the contract, by tendering back the goods; and, where more money has been already paid than the goods or business fraudulently sold are worth, the same may be retained, and the payment of the bill resisted: 2 *Taunt.* 2; 3 *Stark.* 175; 1 *ib.* 51; 1 *Camp.* 40. Where a check is given on \*a verbal condition, which the drawer finds is to be broken or [\*304] eluded, he has a right to stop the payment of it as against such person: 3 *Camp.* 376. A partial failure of consideration will constitute no defence, if the *quantum* to be deducted on that account is matter, not of definite computation, but of unliquidated damages, *Bayl.* 395; and which are the subject of an action, *ib.*: thus, if a bill or note is given for the stipulated price of goods, previously delivered, it is no ground of partial defence that the price was exorbitant: *Solomon v. Turner*, 1 *Stark.* 51. As, where a stipulated price is given for a picture, the deft. will not be allowed to prove the inadequacy of its value, *ib.*; or that the goods were damaged when they ought to have been sound, *Morgan v. Richardson*, 1 *Camp.* 40, n., 2 *ib.* 346, *Brown v. Davis*, 7 *East*, 480,

*Basten v. Butler*, *ib.* 479; unless the contract was rescinded on that ground: *Lewis v. Cosgrave*, 2 *Taunt.* 2. So, it is no answer to an action on a bill or note, that it was given as the condition of a lease to be executed by the plt. and of letting the deft. into possession of the premises, and that plt. had refused to execute the lease, for he is not bound to execute till the price is paid; and, as the deft. was let into possession, the consideration fails in part only; and the sum to be allowed for such failure is matter not of mere calculation, but of unliquidated damages: *Moggridge v. Jones*, 14 *East*, 486. So, it is no answer to an action on a bill or note, that it was for an apprentice fee, and that the apprenticeship had been dissolved for misconduct in the master: *Grant v. Welchman*, 16 *East*, 207; *sed vide* *Ledger v. Ewer*, *Pea. Rep.* 216; *Bayl.* 895-6.

*Between what Parties the Consideration may be Questioned.*] Between the original or immediate parties, as the drawer and acceptor, drawer and payee, endorsee and his immediate endorser, want of consideration may be insisted on, *Chit. B.* 70. *Str.* 674, 7 *T. R.* 121; and, when the holder plt. took it from one of such parties, after the bill fell due, the deft. may avail himself of any defence that he might have set up in an action against him by such party. But a want of consideration cannot be a bar to an action on a bill in the hands of a *bona-fide* holder, for value, before the bill fell due, *Collins v. Martin*, 1 *B. & P.*, 651; and it will always be presumed the plt. holds for value, unless the contrary appear, the *onus probandi* of which lies on deft. If, indeed, it can be proved the plt. gave no value for the bill, then it will be presumed he is in privity with the first holder, and will be affected by every thing which would affect such first holder: *ib.* The want of consideration, in *toto* or in part, cannot be insisted on, if the plt., or any intermediate party, between him and the deft., took the bill, *bona fide*, and upon a valuable consideration: *Bayl.* 397. But, in an action by endorsee, if it appear that a prior party made it under duress, or was defrauded of it, and the plt. has previous notice so to do, he must be prepared to prove under what circumstances, and for what value, he became holder: *Duncan v. Scot*, 1 *Camp.* 100. In an action by an endorsee against acceptor, if the deft. show there was no consideration between him and drawer, it lies on plt. to prove that plt., or some other person, gave value for it: *Thomas v. Newton*, 2 *C. & P.* 606.

It makes no difference whether the plt. a *bona fide* holder for value, knew the deft. received no consideration for his being a party to the bill, if the deft. became such party as an accommodation: *Smith v. Knox*, 3 *Esp. Rep.* 47, 6 *Dow.* 237. But, if the bill was given for a specific purpose, which has not been satisfied, and that is proved to have been known to plt., then he cannot recover: *ib. Chit. B.* 59. If plt. be proved to be the agent of a party who cannot recover, neither can he: 1 *Moo.* 556. Where the holder did not give *full* value for the bill, which was an accommodation one, and that known to him when he gave the part of such value, it was held he could only recover such part:

*Wiffin v. Roberts*, 1 *Esp. Rep.* 261. If one of three partners  
 [\*305] undertake to provide for a bill drawn by the firm \*upon, and accepted by deft., the latter may, in an action at the suit of the

three partners, give in evidence such undertaking as a defence: *Righ-  
would v. Heap*, 12 *East*, 323.

*When Plt. bound to prove a Consideration in the first Instance, and when Deft. must give a Notice to dispute it.*] Bills and notes are presumed to have been made on good consideration, and it is not necessary for plt. to prove it in the first instance on the trial, 2 *Freem.* 257, *Chit. B.* 68, unless he brings an action as bearer of a bill transferable by delivery, and then only under suspicious circumstances first proved by deft.; as, where the bill has been lost, and the plt. cannot give a reasonable account how he came by it, and has had due notice, before the trial of the action, to prove the consideration, &c., which he gave for the instrument: *Duncan v. Scott*, 1 *Camp.* 100; 3 *Burr.* 1516, 1527; 2 *Camp.* 5; *Chit. B.* 68.

In order to set up the defence of want of consideration, it is incumbent on deft. previous to the trial, to give distinct notice to the plt.'s attorney to prove the consideration: *Bayl.* 379; *Paterson v. Hardacre*, 4 *Taunt.* 114. As to proof of service of such notice, *post*, "Notices." The notice must be given a reasonable time before the trial. In addition to such notice, deft. must also cast some suspicion upon plt.'s title, either in his cross-examination, or by other testimony, and show that the bill was obtained from the deft. or some previous holder, by undue means: this may be done by the cross-examination of plt.'s witness, or other testimony, or plt. need not go into any evidence of the consideration: *Reynolds v. Chettel*, 2 *Camp.* 596; *Rawlings v. Hall*, 1 *C. & P.* 11. However, no notice need be given in K. B., where the deft. can make out a strong case of fraud or want of consideration against the plt.; as, where the plt. is a party to the fraud, or the nature of the transaction is itself intrinsically notice: *Green v. Deakin*, 2 *Stark.* 347. But it appears to be always requisite, by the practice of the C. P., to do so in that court: *Paterson v. Hardacre*, 4 *Taunt.* 114, *supra*. When plt. has received due notice from the deft. to prove the consideration, his counsel may do so in the outset, or if no suspicion has been cast upon the plt.'s title by the cross-examination of his witnesses, he may reserve himself as to the proof of the consideration, till deft. has cast a suspicion on his case, or has proved that deft. received no value. When plt. may go into full evidence of the circumstances under which he holds the bill, *Abbott, C. J.*, has at N. P. declared this is the correct course; and, according to the note in *Browne v. Murray, R. & M.* 253, this practice of the K. B. prevails also in the C. P., though it was otherwise ruled in *Spooner v. Gardiner, R. & M.* 86; *Chit. B.* 401. And *Lord Ellenb.*, in *Delauney v. Mitchell*, 1 *Stark.* 439, held, that when the consideration is to be gone into, it should be done at first. "But, if the plt. thinks fit, in the outset, to call any evidence as to the consideration, he must go through all the evidence he proposes to give for that purpose, and he shall not be permitted to give further evidence in reply:" *p. Abbott, C. J., R. & M.* 254.

**ILLEGAL CONSIDERATION.** *When Defence may be set up.*] Whenever the deft. is at liberty to insist on the want of consideration as a defence, he may always insist that the consideration for the bill, or a part thereof, was illegal: 1 *W. Bla. Rep.* 445; 3 *Taunt.* 226; *Chit. B.* 74.

As to what is an illegal consideration, see *Chit. B.* 74 to 85, *a.*; *post*, "*Illegal Consideration.*"

A subsequent illegal contract or consideration of any description taking place in a second endorsement or transfer of a bill, and not in its inception, nor in a transfer through which the holder must make title, will not invalidate the same, in the hands of a *bona-fide* holder, who took it before it became due. 1 *Stark.* 385; 1 *Eust.* 92; 3 *T. R.* 391; *Chit. B.* 7 *ed.* 87.

With respect to a bill *substituted* in lieu of one given on an [\*306] \*illegal consideration, it will, in general, be open to the same objections as the original bill or note, 2 *B. & A.* 588; but, if the new bill is given for a consideration excluding what made it originally illegal, and all other illegal considerations, it will be good, *ib.* Thus, if a bill given originally on an usurious consideration, be substituted by a bill confined to what remains due for principal and legal interest, it will be good: *Bay.* 407; 2 *Stark.* 287; 1 *Camp.* 187; 2 *Taunt.* 184. Where a bill, affected by an illegal consideration, being in the hands of an innocent holder, and the latter, on being informed of the illegality, takes a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by a third person for the accommodation of the other party, it was held that he could not maintain an action against the acceptor of this substituted bill: *ib.*, *Tate v. Willings*, 3 *T. R.* 538; 4 *Taunt.* 683. "If a bill or note is given in part upon a legal, and in part upon an illegal consideration, and several bills or notes are afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the other stand exempt; as, where a bill or note is given as to half for a gaming debt, and as to the residue for money received, and two bills or notes, of equal amount, are afterwards substituted for it, if the giver does any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other: promising to pay one, whilst both remain unpaid, shall be deemed an election to ascribe the gaming debt to the other, *Bayl.* 409; and the receiving of a bill or note, if the whole of the consideration be not bad, will not extinguish the good part of the consideration. Thus, the receiving a bill or note upon an usurious contract, but given for a previous legal subsisting debt, will not extinguish such debt, though the security itself will be void, 3 *Camp.* 119; but, if there was usury in the concoction of the bill, even the principal and interest cannot be recovered: 9 *Ves.* 84; 1 *T. R.* 153.

Where a bill or note is given on a consideration *bad in part*, the whole becomes illegal; as, where part of it was for spirits sold in small quantities, and the rest for money lent: *Scott v. Gilmore*, 3 *Taunt.* 226; 6 *Esp. Rep.* 24; and 3 *Camp.* 9, *contra*. Where a bill of exchange was partly for money lent at the time and place of play, and partly for money lost at play, it was held that the plt. could recover nothing upon the bill, but that he might recover the money lent on the count for money lent, as the bill was thereby wholly vitiated: *Robinson v. Bland*, *Burr.* 1077.

With respect to *what party may set up illegality of consideration* as a defence, such illegality may be shown between the immediate parties

themselves, and all parties privy to the illegality when they took the bill. Where a third person, having given value for a bill, knew, at the time he became the holder, that it was originally founded on an illegal transaction, *Steers v. Lashley*, 6 T. R. 61, 1 Esp. Rep. 166, s. c., *Wyat v. Bulmer*, 2 Esp. Rep. 538, *Brown v. Turner*, ib., 631, 7 T. R. 630, s. c., *Feise v. Randall*, 6 T. R. 146, *Chit. B. 7 ed.* 85, a., or where a person became holder of such a bill after it became due, he cannot recover on it: *Brown v. Turner*, 7 T. R. 630. However, a person who, at the request of the holder of a bill, endorses it, and is obliged to pay the contents to a *bona-fide* holder, may recover the money paid from any person whose name is on it: *Seddens v. Stratford*, *Peake's Rep.* 215; *Petrie v. Hannay*, 3 T. R. 424; *Aubert v. Maze*, 2 B. & P. 371. In cases where the legislature has declared that the *illegality* of the contract or consideration shall make the bill or note *void*, the deft. may insist on such illegality, though the plt., or some party between him and the deft., took the bill *bona-fide*, and gave a valuable consideration for it. And the innocent holder can, in such case, only resort to the party from whom he received the bill, &c., and then he cannot recover upon the same, but only on the original consideration: *Bendelack v. Morier*, 2 H. Bla. 338; *Bowyer v. Bampton*, 2 Str. 1155; *Wyat v. Bulmer*, 2 Esp. Rep. 538-9; *Witham v. Lee*, \*4 ib. [\*307] 264. And it has been decided that, if the *payee* of a bill of exchange endorse it upon an usurious contract made at the time of such endorsement, a *bona-fide* holder cannot afterwards recover upon it against the acceptor, because such holder must claim title through such first endorser: *Lowes v. Mazzaredo*, 1 Stark. 385. But, unless it has been so expressly declared by the legislature, illegality of consideration will be no defence in an action at the suit of a *bona-fide* holder, without notice of the illegality, *Wyat v. Bulmer*, 2 Esp. Rep. 538, *Brown v. Turner*, 7 T. R. 630, unless he obtained the bill after it became due: *Amory v. Mereweather*, 2 B. & C. 579; and see further *Chit. B. 7 ed.* 86. By 58 G. 3, c. 93, no bill or note shall, though given for an usurious consideration, or upon an usurious contract, be void in the hands of an endorsee for valuable consideration, unless such endorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury.

By suffering a judgment by default, the deft. loses the opportunity of objecting to the sufficiency or legality of the consideration: 4 T. R. 275; 4 Taunt. 683.

ACCORD AND SATISFACTION.] In an action on a bill or note, deft. may prove that the bill has been satisfied, or plt.'s claim thereon extinguished, *Bayl.* 267; as by showing that plt. has taken a security of a higher description from the deft., for the money due upon the bill or note, *Bayl.* 267; or by taking a third person's note as a security for the original debt, or for a composition with a party's creditors, *Lewis v. Jones*, 4 B. & C. 513, *post*, "*Composition*;" or that it has been satisfied by payment or otherwise. In an action against the acceptor by the endorsee, where a bill is payable to a third person, deft. may prove that it has been paid by the drawer himself, whereby he will be released from his obligation, *Beck v. Robley*, 1 H. Bla. 89, n., *Burbridge v. Man-*

ners, 3 *Camp.* 194; but, where the bill is payable to the drawer's own order, and he makes payment to an endorsee, and again circulates the bill upon his own endorsement, such transaction not prejudicing any other parties to the bill, and not releasing the obligation of the acceptor, he cannot set it up as a satisfaction: *Callow v. Lawrence*, 3 *M. & S.* 95, 7. In an action by endorsee against maker of a promissory note, payment by the payee may be set up as a satisfaction, if notice has been given: *Cooper v. Davis*, 1 *Esp. Rep.* 463. And taking a new bill from the acceptor, the original bill to be kept as a security, operates as evidence of an agreement that, in the meantime, the original bill shall not be enforced: *Gold v. Robson*, 8 *East*, 580; *Dillon v. Rimmer*, 1 *Bing.* 100, 2. But taking a warrant of attorney to enter up judgment does not operate as a satisfaction, unless judgment is actually entered up, *Bayl.* 267: as, where, an action having been brought against the acceptor of a bill of exchange, it was agreed between the parties that the deft. should pay the costs, renew the bill, and give a warrant of attorney to secure the debt, the deft. gave the warrant of attorney, and renewed the bill, but did not pay the costs: *Norris v. Aylett*, 2 *Camp.* 329. And, where one of three partners, after a dissolution of partnership, undertook by deed to pay a partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills: it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards receiving them several times successively, did not amount to satisfaction of the joint debt; and *Holroyd, J.*, said, "I think that the giving of the three notes by the one partner will not operate as a satisfaction of the joint debt: for, in the first place, it is not a satisfaction of a higher nature; and, [\*308] in the second, \*there was an express reservation of plt.'s claim against all the three, and the agreement between the three partners cannot vary the plt.'s right, even though it was communicated to him:" *Bedford v. Deakin*, 2 *B. & A.* 210. And in no case will the taking a collateral security amount to a satisfaction: *Pring v. Clarkson*, 1 *B. & C.* 14. Where the holder of a bill of exchange, being a security for a debt due from A., B., C., and D., endorsed over and put the bill in the hands of B., C., and D., who settled their accounts with A., saying that the bill had been satisfied by them, but the bill itself was not produced to or seen by A. at the time of such settlement, held that this was no defence to A. in an action by the holder against A., B., C., and D., the bill not having been, in fact, satisfied by the persons to whom it had been endorsed and handed over: *Featherstone v. Hunt*, 1 *B. & C.* 113.

**GIVING TIME to other Parties to Bill.]** In general, giving time to any of the parties, is a discharge of every other party who, upon paying the bill or note, would be entitled to sue the party to whom such time has been given. The acceptor of a bill is primarily liable; and the drawer and endorsers may be considered in the nature of sureties for the performance of his acts, *Clark v. Devlin*, 3 *B. & P.* 366; therefore, if

the party take a bond, or any security, payable at a future day, from the acceptor of a bill, or maker of a note, without the assent of the other parties, it would discharge them from liability: *Claxton v. Smith*, 3 Mod. 87; *Bayl.* 371. Though there is no obligation on the part of the holder to use active diligence, by suing the acceptor, or any other party, yet he must not give him time, so as to preclude himself from suing him, and suspend his remedy against him, in prejudice of the drawer and endorsers, *p. Ld. Eldon*, 6 Ves. 734; and, if a holder agree to give indulgence for a certain period of time to any of the parties to a bill, this takes away his right to call upon that party for payment before the period expires, and not only to call upon him, but on all the intermediate parties: for otherwise, if he were to oblige them to pay the bill, they could immediately resort against the very person whom the holder has indulged, which would be inconsistent with his agreement, and a fraud upon him: *p. Bailey, J., Claridge v. Dalton*, 4 M. & S. 232. And, when a bill or note becomes due, if the holder renews it, or agrees with the drawer or maker, for a valuable consideration, to give him time for payment, without the concurrence of the other parties entitled to sue such drawee or maker on the bill or note, they will thereby in general be discharged from all liability, although the holder may have given due notice of the non-payment. So, where, in an action by the endorsee against the endorser of a note, the note being presented for payment when due, the maker desired two or three days' time to pay it in, and so from time to time, which was given him by the then holder, it was held that, as there had been a credit given, plt. could not recover: *Anderson v. George*, cited S. N. P. 396. As to giving time, the holder does it at his peril; and in no case has it been determined that the endorser is liable, after the holder of the note has given time to the maker: *p. Buller, J., Tindal v. Brown*, 1 T. R. 171; *English v. Darley*, 3 B. & P. 61. And it has been held that, if the holder of a bill of exchange, when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future day, and that, in the meantime, the holder should keep the original bill in his hands as a security, such agreement amounts to giving time, and a new credit to the acceptor, and discharges the endorser, who was no party to such agreement, though the drawer might have no effects in the hands of the acceptor, *Gould v. Robson*, 8 East, 576; and a like indulgence to a drawer, or a prior endorser, would also discharge all subsequent parties: *ib.* And the releasing an acceptor, or other prior party to a bill or note, would discharge a subsequent party; and where, in an action on a note, against \*one who had endorsed it for the accommodation of the [\*309] maker, it appeared that the plt. the endorsee, had signed an agreement to accept from the maker of the note five shillings in the pound in full of his demand, on having a collateral security for that sum from a third person, it was held that the debt. was thereby discharged: *Lewis v. Jones*, 4 B. & C. 506; 6 D. & R. 567. The mere change, or addition, of securities, without expressly relinquishing the original debt, or suspending for a time the creditor's right of action, will not discharge a surety or party to a bill: *Thomas v. Courtney*, 1 B. & A. 1; *post*, "Composition." And a composition with the acceptor, or other party to a bill,



reserving the remedy for the remainder against the other parties, will not discharge such other parties: 18 *Ves.* 20; 4 *B. & C.* 507. Accepting a mere collateral security from the acceptor, will not discharge the other parties to a bill: thus, where, a bill having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, endorsed it to the plt., it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer: *Pring v. Clarkson*, 1 *B. & C.* 14; 2 *D. & R.* 78. As there is no obligation of active diligence on the part of the holder, after regular notice of the non-payment of a bill, the holder may tacitly forbear to sue the acceptor, provided he do not agree for sufficient consideration to give a precise time, *Walwyn v. St. Quintin*, 1 *B. & P.* 652; and it has been held, that agreeing (after a bill has become due, and been regularly protested for non-payment, and notice thereof given) not to press the acceptor, will not discharge the drawer. And, where the holders of a bill, which had been refused payment by the acceptor, gave notice thereof to the drawers, but informed them, that they had reason to believe it would be taken up in a few days, and offered to retain the bill till the end of the week, unless they received their instructions to the contrary, it was held that such conduct did not discharge the drawer, though no further notice of non-payment was given, *Forster v. Jurdison*, 16 *East*, 105; and even an express agreement not to sue after notice given, but without sufficient consideration, and without taking any new security, will not discharge the parties, as it is *nudum pactum*: *semb. Walwyn v. St. Quintin*, 1 *B. & P.* 655; *Dean v. Newhall*, 8 *T. R.* 168; *Fitch v. Sutton*, 5 *East*, 230. A conditional agreement, to give time to the acceptor, on his paying part, which condition is not performed by the acceptor, is not a discharge to the endorsers: *Badnall v. Samuels*, 3 *Price*, 521. Taking a cognovit from the acceptor, by which the time of obtaining judgment against him is not deferred, does not seem to be such a giving of time as will discharge the drawer: *Jay v. Warren*, 1 *C. & P.* 532; *Lee v. Levi*, 4 *B. & C.* 390; 5 *Taunt.* 319. The taking a warrant of attorney from the acceptor, after action brought against the endorser, cannot be given in evidence under the general issue in the latter action, being matter of defence arising after action brought: *Lee v. Levi*, 4 *B. & C.* 390. The giving time, or taking security from one of several acceptors of a bill, or makers of a note, will not discharge the other acceptors or makers from liability, *Bedford v. Deakin & ors.*, 2 *B. & A.* 210; but the releasing such one would discharge the rest, *Co. Lit.* 232; unless, indeed, the instrument of release contained merely a covenant not to sue that one, 8 *T. R.* 168; and this legal operation of a release to one of several acceptors, &c., may be restrained in some cases by the express terms of the instrument; *Solly v. Ellerman*, 2 *Moo.* 90. In those cases where the laches of the holder, in not giving notice of the

non-acceptance of a bill, will be excused by the circumstances of the drawer, endorser, &c., not having effects in the hands of the drawee, such \*parties will also be discharged by the holder's [\*310] giving time, or taking security from the acceptor: *Walwyn v. St. Quintin*, 1 B. & P. 652. Thus, the holder for value of a bill accepted for the accommodation of the drawer, may prove the bill under a commission against the drawer: *ex. p. Holden*, C. B. L. 167. But this would be allowed, if the bill were drawn for the accommodation of the acceptor: *Hill v. Read*, D. & R. C. 26. And, where the acceptor of a bill is merely an agent for the drawer, who is the purchaser of goods, the holder's renewing the bill without the drawer's consent, will not discharge him: *Clark v. Noel*, 3 Camp. 411. If there be any evidence of the assent of the drawer or endorser to the security being taken from, and time given to, the acceptor, or if, after notice of the time having been given, the drawer or endorser promise to pay, he is precluded from taking advantage of the indulgence of the acceptor: *Bayl.* 153-4; *Clark v. Devlin*, 3 B. & P. 363; *Stevens v. Lynch*, 12 East, 38. But, where the holder of a bill, on its becoming due, allowed the acceptor to renew it without consulting the endorser, but he afterwards said to the acceptor, "it was the best thing that could be done," it was held that the endorser was discharged, as it was not a recognition of the terms granted by the holder to the acceptor, but that it was, he considered, as referring to the acceptor of the bill, to whom the arrangement was obviously advantageous; *Whithall v. Masterman*, 2 Camp. 179.

If the holder of a bill agree not to sue the acceptor, upon his making an affidavit that the acceptance is a forgery, he will be precluded from suing him if such affidavit be made and sworn, though it be false: *Stevens v. Thacker*, Pea. Rep. 187; *Bayl.* 169. But, if the holder of a bill which has become due, after protest for non-payment and notice, agree not to press the acceptor, he does not thereby discharge the drawer; but the drawer would not have been liable if no protest or notice had been made, *Walwyn v. St. Quintin*, 1 B. & P. 652; nor will the receiving part of the money on account, from an endorser: *ib.* Indulgence to the payee of a bill cannot affect the drawer; he may, nevertheless, pay, and enforce his remedies: *Collott v. Haigh*, 3 Camp. 281; *Bayl.* 274. And so, a release to the payee of a note does not discharge the maker, though the note were an accommodation-note, unless that fact were known to the releaser when he gave the release, *Carstairs v. Rolleston*, 5 Taunt. 551, 1 Marsh. 207, *Bayl.* 273; and a discharge of any of the endorsers will discharge all subsequent, though not prior, endorsers, *Smith v. Knox*, 3 Esp. Rep. 46; *English v. Dailey*, 2 B. & P. 62; *Claridge v. Dalton*, 4 M. & S. 232. And so, a prior endorser may be sued after a subsequent endorser, who had been taken in execution, had been released from prison on a letter of license, without paying the debt: *Hayling v. Mulhall*, 2 W. Bl. R. 1235. The holder of an accommodation-note, who has covenanted not to sue the payee, for whose accommodation the note was made, may yet sue the maker: *Mallet v. Thompson*, 5 Esp. Rep. 158; *ante*.

**WAIVER AND RELEASE.]** The obligation of a complete acceptance may be waived, *Bayl.* 163, either by express agreement between the

parties,—as, where it was agreed that the acceptance should be considered “at an end,” *Walpole v. Pulteney*, cited *Doug.* 236–7, 248–9; or by “a message to the acceptor of an accommodation-bill, that the bill was settled with the drawer, and he need give himself no further trouble,” *ib. Bayl.* 164; or, where the holders of the bill said, “they looked to the drawer, and should not come upon the acceptors of the bill,” *Ld. Ellenb.* held it a question for the jury, whether the words imported an absolute renunciation by them, as holders of the bill, of all claims in respect of it against the acceptors, or only imported, that they looked to the drawer in the first instance; and the jury found for the plts.: *Whatley v. Tricker*, 1 *Camp.* 35. The liability of the acceptor may also be waived by implication, “as by the receipt of the known [\*311] consideration of the bill:” *Bayl.* 165. \*If the holder receive part of the money from the drawer, and the drawer promise to pay the residue at an enlarged time, it is for a jury to determine whether the acceptor’s liability is thereby waived: *Ellis v. Galindo*, *Bayl.* 166. Where a bill has been accepted for the mere accommodation of the drawer, it has been held, that if the holder, knowing that circumstance, give time to the drawer, the acceptor will be discharged, *Laxton v. Peat*, 2 *Camp.* 185; but this has been doubted: *Bayl.* 167.. A neglect to call upon the acceptor, or an indulgence to any of the parties, though for ever so long a time, shall not be considered as a waiver: *ib.* 168.

**PAYMENT, by and to whom made.]** In order to render a payment as a defence, it must be proved to have been made to the proprietor of the bill, or to some person authorized by him to receive it, *Bayl.* 256: as, one of several partners, *Duff v. E. Ind. Comp.*, 15 *Ves.* 213; or a factor, *Farene v. Bennett*, 11 *East*, 40. But, in ordinary cases, the mere production of a bill of exchange, note, or check, is, in general, sufficient to warrant the payment to the person who produces it, *Owen v. Barrow*, 1 *N. R.* 103; and though he be not proved to be the agent of the same party: 12 *Mod.* 554; *Paley, P. & A.* 181. Where the proprietor dies, payment should be made to his personal representative, if he have the power of administering his effects: *Allen v. Dundas*, 3 *T. R.* 125. And a *bona-fide* payment to a person who has obtained probate of a forged will of a deceased party, will be valid, *ib.*,—if he become bankrupt, to his assignees; if he be an infant, to his guardian: and payment to the infant himself may be good, at least if it be beneficial to him, *post*, *Pl.* 160. In the case of a married woman, payment should be made to her husband: *Connor v. Martin*, 2 *Str.* 516, cited 3 *Wils.* 5. On a bill payable to A. or order, to the use of B., payment should be made to A. or his endorsee, and not to B.: *Cramlington v. Evans*, 2 *Vent.* 310; *Marchington v. Vernon*, 1 *B. & P.* 101. When a bill is endorsed to a person merely for the purpose of receiving payment for the endorser, and the authority given to the endorsee is afterwards revoked, either by the party himself or by operation of law, as by his death, it seems, payment to the endorsee will not discharge the person making it, if he had notice of the revocation: *Poth.* 168; *sed quære Tate v. Hilbert*, 2 *Ves. J.* 114–16–18.

Payment to a bankrupt will be good, if made *bona-fide* and without notice of the bankruptcy, by 6 *G.* 4, c. 16, s. 82. And accepting a bill

drawn by a trader after a secret act of bankruptcy, *Wilkinson v. Casey*, 7 T. R. 711, will be protected as much as payment; though the bill do not become due, it is notorious that a commission against him has issued. The acceptance which creates an obligation to pay is within the protection of the above act, as much as actual payment: *Bayl.* 256. And payment to a bankrupt, or accepting on his account, even after a commission issued, will be as much protected as a payment before, if the party paying or accepting knew nothing, and had not the means of knowing of such commission: *Sowerby v. Brookes*, 4 B. & A. 523, *Bayl.* 257. And payment to a bankrupt's order, without notice of his being so, will be a sufficient discharge to the person making it: *Coles v. Robins*, 3 Camp. 186.

But payment to a person or his order, after the knowledge of his having committed an act of bankruptcy, would constitute no defence: *Kitchen v. Barch*, 7 East, 53. Therefore, it has been held, that where a banker pays the draft of a trader who keeps cash with him, after notice of an act of bankruptcy, such payment will be no answer to an action by the assignees to recover the money, *Vernon v. Hanky*, 2 T. R. 113, *ib.* 287, unless the payment were by compulsion of law: 14 Ves. 557. But still, until a commission has issued against the holder, there is no defence to an action at his suit: *Prichell v. Down*, 3 Camp. 131. Payment to a trader in prison, if the party have notice of the fact, and if the requisite time to constitute an act of bankruptcy be afterwards completed, will not \*be protected, *King v. Leith*, 2 T. [\*312] R. 141; but it would be otherwise if the party had no such notice: *Coles v. Robins*, 3 Camp. 183; *Cash v. Young*, 2 B. & C. 413.

A payment made by a bankrupt to one not having notice of the bankruptcy or insolvency, and being a *bona-fide* creditor, by the bankrupt's having drawn, negotiated, or accepted a bill of exchange, is protected by the stat. 6 G. 4, c. 16, s. 82. As to the decisions which affect the construction of this act, see *Chit. B.* 117 to 120. This act, differing from the former, does not require payment to be made in the *course of trade*; and, therefore, decisions on this question are omitted. When the holder of a bill or note, endorsed in blank or payable to bearer, loses or is robbed of it, and it is presented, though by the person stealing or finding it, to the drawee, at the time it is due, and it is paid, in the course of business, without knowledge of the loss or robbery, or other suspicious circumstances, it will discharge him; and, though he had notice of the fact, if the party presenting it were a *bona-fide* holder, such notice would not invalidate the payment: *Solomons v. Bank of England*, 13 East, 135; *Chit. Bills*, 148; *Gill v. Cubitt*, 3 B. & C. 466; *Down v. Halling*, *ib.* 300, 6 D. & R. 455; *Snow v. Peacock*, 3 C. & P. 215; *Glover v. Thompson*, R. & M. 403; *Egan v. Threlful*, 5 D. & R. 326. But a payment before a bill is due will not discharge the drawee, unless to the real proprietor: *Lawson v. Weston*, 4 Esp. Rep. 56, *Chit. B.* 147. Where a bill, transferable only by endorsement, and not endorsed, is lost by the person entitled to endorse, no other person can transfer the interest in the bill, and, consequently, a payment by the drawee, even to a *bona-fide* holder, will not, in such case, be protected: *Chit. B.* 148-9.

*Part-Payment.*] It was formerly held, that when the holder of the bill takes payment in part, from the acceptor, of the sum due on the bill, without the assent of the other parties to the bill, he was precluded from afterwards suing them thereon: *Tassel v. Lewis*, 2 *Ld. Raym.* 744; *Kellock v. Robinson*, 2 *Str.* 745; *Hull v. Pitfield*, 1 *Wils.* 48. But it seems now to be decided, that the mere receiving part payment from the acceptor, does not discharge the other parties, unless time or a release be given to the acceptor for the payment of the residue: *Gould v. Hobson*, 8 *East*, 580; *Walwyn v. St. Quintin*, 1 *B. & P.* 652. And a conditional agreement to give time to the acceptor, in consideration of his paying part of the amount of the bill, will not discharge the endorser, if the agreement be not performed by the acceptor: *Badnall v. Samuel*, 3 *Price*, 521. The taking part payment from the acceptor of a dishonoured bill, after notice given to the drawer, does not discharge the drawer; but it would be otherwise if the holder had disabled himself from suing on the bill; as, by not having given notice of its dishonour: *Hewett v. Goodrich*, 2 *C. & P.* 468. And, if the holder of a joint and several promissory note enter up judgment, by *cognovit*, against one of the makers, and levy part under a *fi. fa.*, this is no discharge of the other: *Ayrey v. Davenport*, 2 *N. R.* 474, *Chit. B.* 297, *b.*

Endorsements of partial payment made by the holder himself, may, "if they are proved to have been written at a time when the effect of them was clearly in contradiction of the writer's interest," be sufficient to take a case out of the Statute of Limitations: *Rose v. Bryant*, 2 *Camp.* 328.

*Receipt.*] It is the ordinary course to give a receipt on the back of the bill; and it has been said, *p. Ld. Ellenb.*, that it is the duty of bankers to make some memorandum on bills and notes paid to them, *Burbridge v. Manners*, 3 *Camp.* 193; and such receipt may be given in evidence, and need not, like other receipts, be stamped: 44 *G.* 3, *c.* 98.

Where a part payment is made, unless such be marked on the [\*313] bill, the drawer may, it is said, \*be liable to pay the amount again to a *bona-fide* endorsee: *Cooper v. Davies*, 1 *Esp. Rep.* 463. Where an action was brought by the endorser of a bill (who had paid it to an endorsee), against the acceptor, he was nonsuited, although he produced the bill and protest, because he could not produce a receipt for the money paid by him to the endorsee upon the protest, according to the custom of merchants; though *Holt, C. J.*, seemed to be of opinion, that, if the plt. could have proved payment by any evidence, it would have been sufficient: *Mendez v. Carreroun*, 1 *Ld. Raym.* 742. It has been held, that a general receipt, on the back of a bill of exchange, is *prima-facie* evidence of its having been paid by the acceptor, *Scholey v. Walsby*, *Pea. Rep.* 25, and will not of itself be evidence of payment by the drawer, though it is produced by him. It was, however, recently held, that the production of a bill of exchange from the custody of the acceptor, is not *prima-facie* evidence of his having paid it, without proof that it was once in circulation after it was accepted; nor is payment to be presumed from a receipt endorsed on the bill, unless it be proved to be in the handwriting of a person entitled to demand payment: *Pfiel v. Van Battenburgh*, 2 *Camp.* 439. The endorsement of a

check by the borrower, and produced by the lender, is evidence of money lent: *Lloyd v. Sandilands, Gow*, C. 15. Though payment or satisfaction be made on a bill, the party making it may still be liable to a third person, who has been holder of the bill before it became due, if it had been delivered up to him: *Buzzard v. Fleckroe*, 1 Stark. 332. And, in cases where there is a competition of evidence upon the question, whether the security has been satisfied, the possession of it will entitle the party to a verdict: *Brembridge v. Osborne*, 1 Stark. 374. If A. give an accommodation acceptance to B., which B. gives to C. as a security for some acceptances of his, and these acceptances, when they become due, are paid by B. out of the produce of other acceptances given by C., but A.'s acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented: held, that the original transaction is continued, and A., not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given: *Woodroffe v. Hayne*, 1 C. & P. 600. In an action by the payee of a bill of exchange, accepted by the deft. for a valuable consideration, evidence that the plt. had been discharged as an insolvent debtor, after the bill became due, and had given in a blank schedule, is not enough to show that the bill had been satisfied: *Hart v. Newman*, 3 Camp. 13.

**TENDER.]** In an action against the drawer or endorser, they are not precluded from pleading a tender from the circumstance of their not paying the amount of the bill immediately on the receipt of notice of its dishonour, as a reasonable time is allowed them, after such notice, to pay the bill, provided the tender has been made before the writ issued, *Walker v. Barnes*, 5 Taunt. 246, 1 Marsh. 56, s. c., *Soward v. Palmer*, 8 Taunt. 277, 2 Moo. 274, s. c.; where three days were allowed to elapse before deft. tendered the amount. But, in an action against the acceptor, a tender, after the day of payment, though before action brought, is not good, the plea of tender being applicable to cases only where the party pleading it has never been guilty of a breach of contract, *Hume v. Peploe*, 8 East, 168; the effect of a tender sometimes is, that interest cannot be recovered on the bill or note, after it is made; so, where the maker of a promissory note pays money into the hands of an agent, to return it, and the agent tenders the money to the holder of the note, on condition of its being delivered up, and, the note being mislaid, the condition could not be complied with, and the agent aforesaid failed with the money in his hands, it was held that the maker was still responsible on the note, but that interest was not recoverable after the time of the tender: *Dent v. Dunn*, 3 Camp. 296.

**\*SET-OFF.]** Though a bill of exchange is a chose in action, yet it may be assigned so as to meet the legal, as well as the [\*314] equitable interest therein: so, a set-off by the drawer to the acceptor cannot affect the right of action of the payee or endorsee, because the legal, and not mere equitable, interest is vested in such payee or indorsee, and the action maintainable in his own name: *Chit. B. 5*. A set-off will not be allowed on an unstamped bill: *ib.* 55. The holder of a bill, indebted to a bankrupt, who is party to a bill, may set off his debt

against the amount of it: *ex p. Hale*, 3 Ves. 304, 3 T. R. 509. See *post*, "Set-off."

**ALTERATION of Bill.]** Where a bill or note is altered without the consent of the parties, in any material part, as in the date, sum, or time of payment, such alteration will, at common law, render it wholly invalid, as against any party not consenting to such alteration, and though made by an innocent holder. Thus, if the date of a bill be altered, though by a stranger, after it has been accepted and endorsed, and without the acceptor or indorser's consent, they will be discharged from their liability: *Master v. Miller*, 4 T. R. 320, 5 ib. 367. And, where the drawer of a bill of exchange, accepted generally, without the acceptor's consent, added the words, "payable at Mr. B's, Chiswell Street," it was held that this was a material alteration, and that the acceptor was thereby discharged: *Cowie v. Halsal*, 4 B. & A. 197. And such an alteration would render the bill invalid, though made after the passing of 1 and 2 G. 4, c. 78: *Mackintosh v. Hayden*, 1 R. & M. 362. So where a joint note was altered into a joint and several note, *Perring v. Hone*, 12 Moo. Rep. 135. See further, *ante*, "Alteration."

**STATUTE OF LIMITATIONS.]** A bill of exchange, also, being merely a simple contract, is affected by the Statute of Limitations, and must be sued on within six years after it is payable: *Renew v. Axton*, Carth. 3. As to the effect of a partial endorsement, *ante*, 312. Where a bill or note is payable a certain time after sight, the debt does not accrue till it has been presented to the drawee; the stat. is, therefore, no bar to such a note, unless it has been presented for payment six years before the action was commenced: *Holmes v. Kerrison*, 2 Taunt. 323. An acknowledgment by one of several drawers, of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a separate action on the note against him, *Witcomb v. Whiting*, Doug. 652-3, 306; and although the latter were only a surety: *Perham v. Raynal*, 2 Bing. 306. And, in an action against A., on the joint and several promissory note of himself and B., to take the case out of the stat. it is sufficient to prove a letter written by A. to B., within six years, desiring him to pay the debt; *Halliday v. Ward*, 3 Camp. 32, 11 East, 585, 1 Stark. 81: when insufficient, see *Perham v. Raynal*, 2 Bing. 306.

#### COMPETENCY OF WITNESSES.

It is a general rule that it is no objection to the competency of a witness that he is also a party to the same bill or note, unless he has a direct interest in the event of the suit. If he has such an interest, he is not admissible; otherwise he is, *Bayl.* 419; or, unless the verdict to obtain which his testimony is offered, would be admissible evidence in his favour in another suit; *Bent v. Baker*, 3 T. R. 27. Where a witness has an interest inclining him as much to one of the parties as to the other, so as, upon the whole, to render him indifferent in whose favour the verdict may be given, he will be competent to give evidence for either party: *Bayl.* 418.

**Drawer.]** In an action against the acceptor, the drawer is a competent witness, either for the plt. or for the deft.; for, if the plt. recovers,

the drawer pays the bill by the hands of the acceptor; if the plt., fails against \*the acceptor, the drawer is liable to pay the bill himself:" *Bay*. 419; *Dickinson v. Prentice*, 4 *Esp. Rep.* 32; *Rich v. Topping*, *Pea. Rep.* 224; *Humphrey v. Mozon*, *ib.* 52. In an action at suit of an indorsee against the acceptor, the drawer or endorser is a competent witness for the deft. to prove that the bill was originally void; as, that it was made in London, though dated abroad, and consequently invalid for want of an English stamp: *Jourdaine v. Lashbrook*, 7 *T. R.* 601. The drawer is also a competent witness to prove usury, 5 *Esp. Rep.* 119, or that the bill has been paid: *Pea. Rep.* 52.

And the drawer is competent where his interest renders him indifferent; as, in an action against one of several makers of a note, another is a competent witness for the plt., as he stands indifferent: for, if the plt. recovers, he will be liable to pay contribution to the deft.; and, if plt. fails, and forces him to pay, he will be entitled to contribution from the deft.: *ib.* *York v. Blott*, 5 *Maule*, 71; *Ridley v. Taylor*, 13 *East*, 175. And, though he might, in some cases, have a greater difficulty in the one case than in the other to enforce his remedy, yet it seems that it would only render him liable to a suspicion of influence, *Phil. Ev.*, though it was once held otherwise: *Buckland v. Tankard*, 5 *T. R.* 579. And, where the defence was a gaming consideration, it was objected that the drawer, who was called by the deft., was interested to defeat the plt., being liable for treble penalties if he recovered, but not if he failed; it was held that the witness was competent, since, if the plt. failed, the witness was liable to him; if he succeeded, the witness might deliver himself from the penalties, by refunding within the time: *Habner v. Richardson*, *Holroyd, J.*, 1818; *Manning's Index*, 327.

Where the verdict would necessarily benefit or affect the witness, as if he be thereby subject to the costs of the action, then, without a release, he will be incompetent: *Jones v. Brooke*, 4 *Taunt.* 464. Thus, where a person has received a bill to get it discounted for the drawer, and delivered it to plt. in payment of a debt, he is incompetent to prove the fact in an action against the drawer, as he would be liable to costs if plt. succeeded: *Harman v. Tasbrey*, *Holt, C.* 390. And, where the acceptor has accepted the bill for the accommodation of the drawer, he is not a competent witness for the deft. without a release: for, if the plt. should fail, the witness would be discharged from his liability to indemnify the deft. against the costs of the action on the bill: *Jones v. Brooke*, 4 *Taunt.* 464. This decision appears to overrule *Birt v. Kershaw*, 2 *East*, 458, and *Shuttleworth v. Stephens*, 1 *Camp.* 407; but, if such accommodation acceptor release the drawer, he will be a competent witness: *Hardwick v. Blanchard*, *Gow, C.* 113. In an action against the acceptor, the drawer is competent to prove the deft.'s handwriting, *Dickinson v. Prentice*, 4 *Esp. Rep.* 32, or to prove his own endorsement: *Willshier v. Coz*, cited *Chit. B.* 416, d.

*Endorser.*] "In an action by an indorsee against drawer or acceptor, an endorser is, in general, a competent witness either for plt. or deft.: for plt., because, though the plt.'s succeeding in the action may prevent him from calling for payment from the endorser, it is not certain that it



will; and, whatever part of the bill or note the endorser is compelled to pay, he may recover again from the drawer or acceptor;—and he is competent for deft., because, if plt. fails against drawer or acceptor, he is driven either to sue the endorser or to abandon his claim:” *Bayl.* 422. In an action by the endorsee against the drawer of a bill, a prior endorser is a competent witness for the plt. to prove his own endorsement to the bill, *Richardson v. Allen*, 2 *Stark.* 334, or that the deft. promised to pay the bill after it became due, *Stevens v. Lynch*, 2 *Camp.* 332, 12 *East*, 38, s. c.; and a prior endorser of a note is a competent witness for the maker to prove it paid: *Charrington v. Milner*, *Pea. Rep* [\*316] 6. So, in an action by the second \*endorsee against the first endorser, the second endorser was held a competent witness to prove that he, on receiving notice of dishonour from the plt., gave notice thereof to the deft.: *anon. cor. Abbott, C. J., at Guildhall, 3d March, 1822, cited Chit. B.* 417. In an action by endorsee against acceptor, the endorser, though released by the deft., was held incompetent to prove that he delivered the bill to the plt., merely for the purpose of procuring payment, as agent for the witness: *Buckland v. Tankard*, 5 *T. R.* 578.

*Acceptor or Drawee.*] In an action against the drawer of a bill, in order to excuse the neglect to give him due notice of the dishonour, the acceptor is a competent witness to prove that he had not received any value for the acceptance; for though, by supporting the action against the drawer, he may perhaps relieve himself from an action at the suit of the holder, yet he at the same time gives an action against himself, at the suit of the drawer, in which the evidence he has given, of the want of consideration, would not avail him, but must be proved by another person: *Staples v. Okines*, 1 *East*, 332. And the drawee may also be called for the same purpose: *Legge v. Thorpe*, 2 *Camp.* 310. But, in an action against a drawer, it has been held that the acceptor is an incompetent witness to prove a set-off for the deft., as he is answerable to the drawer only for the amount which the plt. recovers against the deft.: *Mainwaring v. Mytton*, 1 *Stark.* 83; *sed quære*, for it seems that the drawer would be entitled to call upon the acceptor for the full amount of the bill: *Bayl.* 424.

*An Endorsee.*] Is a competent witness in an action by the holder against the drawer, to prove the payment by the drawer of money into his hands, to take up the bill, and that he has satisfied the bill, for he is liable, at all events, either to the holder or to the drawer, for the amount of the bill: *Birch v. Kershaw*, 2 *East*, 458, *Bayl.* 423.

*A Payee.*] Is, it seems, competent in an action by an endorsee against the acceptor, to prove that the bill was originally void, from a defect of the stamp, 7 *T. R.* 601, having been made in London, although dated abroad. The payee of a bill (drawn for accommodation), who has endorsed it to the plt., is competent, in an action against the drawer, to prove that he endorsed it for a valuable consideration; for, if the plt. should fail, he would be liable to him to the amount of the bill; if he should succeed, he would be liable to the same amount to the deft.: *Shuttleworth v. Stevens*, 1 *Camp.* 407.

## ADMISSIONS.

The effect of admissions will, for the most part, be found, *ante*, "*Admissions*." An admission by a holder of a bill, under whose endorsement the plt. claims, that the amount was settled, after the bill became due, between himself and the acceptor, is not evidence for the latter, as the holder may himself be called: *Duckham v. Wallis*, 5 *Esp. Rep.* 251. Where A. endorsed a bill to B., as a security for a running account, and, after the bill became due, B. endorsed it to C., an entry or declaration by B., as to the state of the accounts, is not admissible evidence for A., unless it were made at the time, and accompanying the endorsement to B.: *Collenridge v. Farquharson*, 1 *Stark.* 259. But, where a bill of exchange was given by the acceptor for the drawer's accommodation, and whilst in his hands he made a declaration that it was an accommodation bill, and that the acceptor had received no value, and, long after the bill was due, the drawer endorsed it to the plt., all accounts between the drawer and the acceptor being then closed, it was held, the declaration of the drawer was admissible, to defeat the plt.'s right to sue; as what would be a good defence against the drawer would be equally a good defence against the endorsee in this case: *Benson* [\*317] *v. Marshall*, cited in 4 *D. & R.* 732; *Chit. B.* 412. What is said by a third party at the time of signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present: *Healey v. Jacobs*, 2 *C. & P.* 616. In cases where a partnership is proved to exist, an admission by one of the debts. of the handwriting of one of the partners to the acceptance, in the name of the firm, is sufficient evidence, *Gray v. Palmer*, 1 *Esp. Rep.* 135; and it will be unnecessary to prove that the debts. were of the Christian names averred in the declaration: *ib.* And this doctrine has been carried so far, that, in an action against three persons, as drawers of a bill of exchange, purporting to have been drawn by an agent of the firm upon one of the partners, it was held, that the acceptance by the drawee was evidence against the three partners of the bill having been regularly drawn, and rendered it unnecessary to prove the authority of the agent: *Porthouse v. Parker*, 1 *Camp.* 82. And the admission by one partner of his partnership with the co-debts., sued with him as acceptors of a bill, and who had been outlawed, has been received as evidence against him to establish a joint promise by all: *p. Ld. Ellenb. in Sangster v. Mazarredo*, 1 *Stark.* 161; *post*, "*Partnership*." The acceptance of a bill drawn by procuration, admits the agent's signature and authority, but not the endorsement by the same procuration: *Robinson v. Yarrow*, 1 *Moo.* 150. But, where the drawer and payee of a bill delivers it to any other, with his name endorsed thereon, proof of such delivery, with the name endorsed, is sufficient, without proving the signature: *Glover v. Thompson*, *R. & M.* 403. Acceptance is also a *prima-facie* admission of effects in hand: *Vere v. Lewis*, 3 *T. R.* 183.

The payment of money into court generally precludes the debt. from disputing the validity of the bill, or showing that it is improperly stamped, and amounts to an admission of an endorsement: *Gutteridge v. Smith*, 2 *H. B.* 374; *Israel v. Benjamin*, 3 *Camp.* 40. And the plt. should,

on the trial, produce the rule; and it will not suffice to call the attorney to prove that he took the money out of court: *ib.*

When the plt. proceeds to ascertain the damages, by executing a writ of inquiry, he need not adduce any evidence, but should produce the bill, to substantiate which, however, no evidence will be necessary, *Green v. Hearne*, 3 *T. R.* 301; for, where the action is on the bill itself, letting judgment go by default is an admission of the cause of action, and of the deft.'s liability to the amount of the bill, *Anon.* 3 *Wils.* 155, *Shepherd v. Charter*, 4 *T. R.* 275; and the amount of the damages alone should be substantiated by the plt., or can be controverted by the deft.; and the production of the bill is required only that it may be ascertained whether any part of it has been paid, *p. Buller, J.*, in *Green v. Hearne*, 3 *T. R.* 301; for the same reason, the deft. cannot give in evidence any matter in defeasance of the action: *E. Ind. Comp. v. Glover*, 1 *Str.* 612. The plt. is entitled to nominal damages, though he do not produce the bill: *Marshal v. Griffin*, *R. & M.* 41. See further as to admissions, *ante*, 277.



## BILL OF EXCEPTIONS.

A BILL of exceptions is an appeal from the judgment or direction of the court, or of the judge at nisi prius: 3 *Salk.* 155. It is founded on matter of law, or on a point of law, arising out of a matter of fact, not denied, *B. N. P.* 317, 3 *Bl. Com.* 372, either as to the competency of witnesses, *Bent v. Baker*, 3 *T. R.* 27, *Bulkeley v. Bulter*, 2 *B. & C.* 442, the admissibility of evidence, 1 *Salk.* 284, or the legal effect of it, *T. Raym.* 404, \*1 *W. Bl. R.* 555, 3 *Burr.* 1693, *Cowp.* 161, 2 *W. Bl. R.* 929, *s. c.*, *Tidd*, 911; or for overruling a challenge, or refusing a demurrer to evidence: *Cro. Car.* 341; 2 *H. Bl.* 208; *Show, P. C.* 120. See the distinction between a bill of exceptions and a demurrer to evidence, drawn by *Best, J.*, 2 *B. & C.* 446. When properly tendered, the bill must be signed by a judge, under authority of 13 *Edw.* 1, *c.* 31, 2 *B. & C.* 446, *Show. P. C.* 120; and, if the bill be returned, "*quod non ita est*," the party may have an action against the judge for a false return: *B. N. P.* 316; 2 *Just.* 426. The statute extends to inferior courts, as well as trials at bar and nisi prius: 2 *Inst.* 427; 3 *Salk.* 355: *B. N. P.* 316. It must be tendered at the trial, and the substance of it reduced into writing: *ib.* The court will in no case grant a motion for a new trial, when a bill of exceptions has been tendered, unless it be subsequently abandoned: 2 *Chit. Rep.* 272. A bill of exceptions is only made use of on writ of error; so that, where a writ of error does not lie, there can be no bill of exceptions: *B. N. P.* 316, *b.*; 1 *W. Bl.* 679. It will not be allowed in criminal cases: *ib.* 316, *a.*; *Willes*, 535. And, after the seal of the judges has been affixed thereto, the truth of the matters therein contained can never afterwards be doubted: *Show. P. C.* 120; *B. N. P.* 316, *a.* If a party tenders a bill of exceptions, and before the return thereof brings a writ of error, he will be deemed to have waived his bill: *Dillon v. Parker*, 1 *Bing.* 17. No bill of exceptions will lie when mat-

ter referred by the judge is not conclusive evidence; and the proper mode of proceeding is by demurrer to evidence: *T. Raym.* 404; 2 *B. & C.* 446. The subsequent proceedings on the writ of error are the same as in other cases: and, if it be reversed, a *venire de novo* issues, which is made returnable in the Court of King's Bench, though the judgment was given in the Common Pleas, 3 *T. R.* 26, or in the Court of Great Sessions, in Wales: 2 *T. R.* 125-6. A bill of exceptions will not be included in the taxation of costs, in the court below, it being no part of the record, till carried into the court of error, where it then becomes a part of the record there, by the judge's seal being acknowledged: *Gardner v. Baillie*, 1 *B. & P.* 33.



### BILL OF LADING.

*Its Effect in Evidence.*] A bill of lading is written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight: *p. Ld. Loughb.*, 1 *H. Bl.* 358. The interest in goods may be proved by the production of the bill of lading, and the evidence of the captain that he had on board the goods mentioned in it: 1 *Esp. Rep.* 373. The bill of lading itself is evidence of property in the consignee: 2 *Camp.* 38, 2 *T. R.* 71, 5 *T. R.* 683. But, if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence either of the quantity of the goods or of property in the consignee, 3 *Taunt.* 363; the signature of the master must be proved, and, if it be endorsed, proof of the endorsement will be necessary, 2 *Phil. Ev.* 48; and the bill of lading will be evidence of property in the hands of the endorsee or holder, 1 *Es.* 373, 1 *T. R.* 215; and it will be such, though the endorsement be special or in blank: 2 *T. R.* 71, *Abbot on Ship.* 392. Where a bill of lading had been signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on his paying freight, the document was held to be evidence to show that the consignee had an insurable interest in the goods: *p. Lawrence, J., Haddow v. Parry*, 3 *Taunt.* 303. Bills of lading for goods and merchandize to be carried coastwise, must be stamped, by 55 *G. 3*, c. 184, *sched.*



### \*BILL OF SALE.

See INDEX.

[\*319]



### BOARD AND LODGING.

THE observations as to the pleadings and evidence in this action, will be found principally collected, *post*, "*Use and Occupation.*" The

finding and providing the board, &c. should be proved by the plt.'s servants or other witnesses; and the agreement as to the sum to be paid also proved: if there be no such agreement, then the value of the board, &c. should be proved. See also "*Work and Labour*," "*Goods sold*."

### *Precedents.*

#### BOARD AND LODGING FOUND AND PROVIDED FOR DEFT.

*The indebitatus count for this claim is as ante, 139, inserting these words:* For certain rooms, apartments, and furniture, of the said plt., before that time used and enjoyed by the said deft., at his special instance, &c., and by the permission of the said plt., and for meat, drink, fire, candles, attendance, and other necessities by the said plt. before that time found and provided for the said deft., and at his like special, &c.; and, being so indebted, &c. (*Conclusion as ante, 139.*) *The quantum meruit thereon as ante, 139, inserting as follows:* Had before that time permitted the said deft. to use and enjoy, and that he, the said deft., had accordingly used and enjoyed certain other rooms, apartments, and furniture of the said plt., and also in consideration that the said plt., at the like special, &c., had before that time found and provided other meat, drink, fire, candles, attendance, and necessities, for the said deft., he, the said deft., undertook, &c. (*Conclusion, ante, 139.*)

#### FOR NECESSARIES FOUND AND PROVIDED FOR THIRD PERSONS.

*Indebitatus assumpti as ante, 139, inserting these words:* For meat, drink, washing, lodging, and other necessities by the said plt. before that time found and provided, at the special instance, &c., for one A. B. (or, for divers persons.) And, being so indebted, &c. *The quantum meruit thereon is as ante, 139, inserting as follows:* Had before that time found and provided other meat, drink, &c., for the said A. B., (or, for divers other persons), he, the said deft., undertook, &c.



## BOND, ACTION ON.

*Form of Remedy, 320.*

*Form of Pleadings, 320.—Declaration, ib.—When necessary to state Condition and Breach, ib.—When not, ib.—When Breaches should be suggested, ib.—When they should be assigned, 321.—Several Breaches, ib.—Mode of stating them, ib.—Pleas and Replications, 322.*

*Precedents.—Declaration in debt on Common Money-Bond in K. B. or Exchequer, 322.—The like in C. P., ib.—Excuses for Proferet, ib.*

*Evidence for Plaintiff.—Bond, &c., 323.—Breaches, ib.—Damages, ib.*

*Evidence for Defendant, ib.*

[\*320]

\**Form of Remedy.*

The action of debt lies to recover money due on single bonds, *Com. Dig. Debt, A. 4, 1 T. R. 40*, or bonds conditioned for the payment of money, or for the performance of any other act by or against the parties thereto, and their personal representatives, *Com. Dig. Debt, A. 4*, and against the heir of the obligor, if he be expressly named in the deed, or

against a devisee having legal assets: *Bar. Ab. Heir*, 7 *East*, 128. But debt does not lie if the money be payable by instalments, or on contingencies, and the whole amount be not due, unless, indeed, the payment be secured by a penalty, as is usual: *Bac. Ab. Debt*, B. 1 *Wils.* 80; 1 *Lev.* 54; 1 *Chit. Pl.* 4 ed. 102. An action of covenant may be supported, 3 *Lev.* 119, *Com. Dig. Action*, 1 M. 4, but it is not usual to bring it. See further, "*Debt*." A promise to the assignee of a bond to pay him in consideration of forbearance, may be sued on in *assumpsit*: 1 *Saund.* 210, n. l. See "*Assumpsit*."

### *Form of Pleadings.*

*Declaration.*] The form of the declaration relative to acts of debt on specialties here applies. See "*Debt*."

The deft. must be declared against by the name he sealed: 3 *Taunt.* 504; 5 *B. & A.* 682. A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad: *ib.* If it appears on the face of the declaration, or other pleadings, that another person jointly sealed the bond, it will be bad in arrest of judgment, 1 *Saund.* 291, b.; but, otherwise, the nonjoinder can only be taken advantage of by plea in abatement: *ante*, 14. In an action against one of several obligors on a joint and several bond, it is usual only to state that the deft. made the bond; but it should seem, that if it be stated that all made it, the execution by the deft. alone need be proved: 4 *Camp.* 34. As to the statement of the time and place of making the bond, see *post*, "*Deed*." A profert of the bond must be stated, as in other actions on deeds; and, as to the profert, see "*Deed*." As to the mode of setting out the bond, see *post*, "*Deed*."

It is not necessary to state the condition and breach of the bond, in pursuance of the 8th and 9th *W.* 3, c. 11, or otherwise; in an action on a common money-bond, 8 *Anne*, c. 16, s. 13, 1 *Saund.* 58, 5 ed., or a bond for the payment of a sum certain at a day certain, as a *post-obit* bond, 2 *B. & C.* 82, 2 *Camp.* 285, or a bail-bond, 2 *B. & P.* 446, *replevin*-bond, 2 *Saund.* 187, or a petitioning creditor's bond, 3 *East*, 22, 7 *T. R.* 300.

On the other hand, all other bonds, either for the payment of money by instalments, 6 *East*, 550, 1 *B. & A.* 214, or of an annuity, 8 *T. R.* 126, or for performance of an award, 6 *East*, 613, 14 *East*, 401, or for the performance of any covenants or agreements, are within the statute, 2 *Saund.* 187, n. c.; and, on such bonds, the condition and breach must appear on the record, or the proceedings will be erroneous: 5 *T. R.* 636, 538; 2 *Wils.* 377. In some cases, at common law, and independent of this statute, it is frequently necessary, in a bond for performance of covenants, where deft. has pleaded a general performance, to assign breaches: see *infra*, "*Replication*."

Where the deft. suffers a judgment by default, the plt. must suggest upon the roll such breaches as he complains of, if the breaches have not been already assigned in the declaration. So, if the plt. gets judgment on a demurrer; so, if the deft., instead of setting forth the condition of the bond upon oyer, and pleading performance, plead any other plea,

which cannot lead to an issue on the breaches, but upon which the plt., if he recovers, must have judgment *quod recuperet*. If, for [\*321] instance, to a declaration \*as on a common money-bond, he plead *non est factum*, 8 T. R. 255, 1 Esp. Rep. 277, or *non est factum*, and that the bond was obtained by fraud and covin, 5 M. & S. 60; or the like, the plt., in making up the issue, immediately after entering the pleadings, may suggest the breaches, and then enter the award of *venire*: 5 M. & S. 60; 8 T. R. 255; 2 Arch. Pr. 42, 293. If, after the first inquisition or trial, deft. be guilty of further breaches, the plt. in order to obtain damages for them, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches, and so proceed to judgment: *ib.* 44.

The usual and best mode of declaring, in these cases is to declare as upon a common money-bond; and the breaches should (unless a judgment by default be expected) be reserved for the replication, because the deft., in rejoining, can only present one answer to each breach; whereas, in pleading to the declaration, he may answer each breach by any number of pleas: 2 Chit. Pl. 4 ed. 440. If the deft. sets forth the condition upon oyer, and pleads performance, or any other plea leading to an issue on the breaches, the plt. then assigns them in his replication, and the defendant, in his rejoinder, takes issue on them.

The plt. cannot assign, as well as suggest, breaches in his replication: 2 Saund. 187, 5 ed.

According to the above statute of *Wil.*, the plt. may assign or suggest as many breaches as he thinks fit. If only one breach be assigned in the replication, it is not necessary to state it in terms to be according to the form of the statute; and it is doubtful whether it be necessary in any case: 13 East, 1; 2 Saund. 187, a., 5 ed.

The breach must be stated according to the facts, and with certainty and particularity, that the deft. may know what he is called upon to answer. A replication, stating a breach, should conclude with a verification: 2 Burr. 774; 1 Saund. 101-2. If the plea does not amount to a plea of *general performance*, but puts in issue a particular fact, plt. need only deny that fact: see the rule, *infra*.

In debt on a bond, conditioned for the performance of an award, if the deft. has pleaded no award, the replication must state the whole of the award verbatim, and also assign a breach: *Willes*, 12; 2 Saund. 62, b., n. 5; 1 Saund. 103, n. 4, 317. See the mode, 1 Price, 109, 6 Taunt. 45, 47. If, to debt on a bastardy or indemnity bond, the deft. plead *non damnificatus*, the plt. must reply specially, setting forth how he was damnified: see *Chit. Pl.* 4 ed. 504-5. Upon a bond conditioned that a collector of poor rates shall render an account of moneys received, after general performance pleaded, it is necessary to reply that he received moneys to be accounted for: 6 Taunt. 45; 1 Marsh. 441, s. c., *semb.*, overruling 1 Price, 109; and see *Doug.* 214. But, where to debt on bond the defendant craved oyer, and, after reciting a mortgage-deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture and for the performance of the covenant therein pleaded, that there was no negative or disjunctive covenants in the indenture, and that he paid

the money mentioned in the condition, on the day therein specified, according to the effect thereof, and performed all the covenants and provisions in the indenture, on his part to be performed, and the plt. in his replication, took issue generally on the non-payment of the money, and concluded to the country, on special demurrer, assigning for causes that it should have concluded with a verification, and that no breach of the condition was assigned, according to the 8 and 9 *W. 3, c. 11, s. 8*, it was held that such replication was good, as the only point in issue, was the payment of the money, and as the plt. had therein denied the whole substance of the deft.'s plea : 5 *Moo.* 198. And a plea (to a declaration on a bond, conditioned, amongst other things, for the payment of £3000), that all the sums of money, which became \*due on [\*322] the bond, were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any breach : 2 *Chit. Rep.* 697.

*Pleas and Replications.*] For the general law relating to these, see "*Deed*," "*Debt*." The qualities of, and necessary pleas and replications in, actions on bonds, within the 8 and 9 *W. 3*, may be collected from the preceding notes. At common law, and independent of this statute, it is frequently necessary, in a bond for performance of covenants, where deft. has pleaded performance, and the plt. has not assigned the breach in his declaration, to deny the effect of the plea, and show a particular breach : the rule is, that in all cases (except in the case of an award, which stands on a particular ground), when the deft. pleads matter of excuse which admits a non-performance, it is sufficient if the plt. deny the plea, and he need not assign a breach in his replication ; but it is otherwise where deft. has pleaded performance, or, in other words, where the plea does not put in issue any particular fact or breach : *Willes*, 12, 13 : see instances, *supra*.

### Precedents.

#### DECLARATION IN DEBT ON COMMON MONEY-BOND IN K. B. OR EXCHEQUER.

(*Commencement as post, "Debt."*) For that whereas the said deft. (*ante*, 320), heretofore, to wit, on, &c. (*date of bond*), at, &c. (*venue*), by his certain writing obligatory, sealed with his seal, and now shown to the court here (*in the Exchequer, say*, now shown to the barons of his majesty's Exchequer here), the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plt. in the sum of £1000, above demanded to be paid to the said plt. Yet the said deft. (although often requested so to do), hath not as yet paid the sum of £1000, or any part thereof, to the said plt., but, so to do, hath hitherto wholly neglected and refused, and still neglects and refuses, to the damage of the said plt. of £10 (*after this, in the Exchequer, say*, whereby he is less able to satisfy our said lord the king the debts which he owes his majesty at the said Exchequer); and therefore he brings his suit, &c. (*It is best not to add any common counts, unless the cause of action arising on them be not merged by the bond.*)

#### THE LIKE IN C. P.

The form in C. P. is the same as the preceding, omitting the profort above in italics, and inserting it at the end, and, instead of saying, "to the damage," &c., say : "Wherefore the said plt. saith, that he is injured, and hath sustained damage to the amount of £— ; and therefore he brings his suit, &c. And the said plt. brings here into court the said writing obligatory, sealed as aforesaid, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid ; the date whereof is the day and year in that behalf above-mentioned."



## COUNTS ON SEVERAL BONDS.

When several counts, whether on the same or on more than one bond, they are as follows: "And, whereas, also, the said deft., heretofore, to wit, on, &c., at, &c., by his certain other writing obligatory, sealed, &c. (same as the first count to the end, and then state) Which said several sums of money in the said first and second counts mentioned amount together to the said sum of £—, above demanded. Yet the said deft., &c."

## AVERMENT IN EXCUSE OF A PROPERT.

\* If the bond be lost, &c., instead of this propret, insert an averment of excuse, thus: "And which said writing obligatory having been lost by lapse of time," or "destroyed by accident," or "by fire," &c. (or when in the deft.'s possession, "being in the possession of the said deft.") "the said plt. cannot produce the same to the said court here." (See post, "Deed," as to propret.)

[\*323] See the various forms of declarations in *Chit. Pl.*, Index to Vol. 3, title "Bond," and in this work, under each particular title; as, "Bail-Bond," "Replevin-Bond," &c.; on Jamaica bond, 2 *Chit. Pl.* 438; on bond to replace stock, *ib.* 442; to perform covenant on another indenture, *ib.* 444; on annuity-bond, *ib.* 442; on bastardy-bond, *ib.* 440; on bonds relating to the character in which the party sues, or is sued, *ib.* 464 to 470; as executors, heirs, &c., *Treaser, ib.* 835.

[Pleas, &c.] Most of the forms of pleas, &c. relating to bonds will be found, post, title, "Deed," and *Chit. Pl.*, Index to Vol. 3, title, "Debt."

[Suggestions, &c. of Breaches.] See forms in *Tidd's Forms*, *Archbold's Forms*, 3 *Chit. Pl.* 1269 to 1296.

*Evidence for Plaintiff.*

The evidence for the most part, will be found, post, title, "Deed," especially as to producing and proving the bond. If the bond be for the performance of covenants in some other deed, the plt. must prove the execution of the latter deed, as well as of the bond, and the breach of covenant. If plt. sues in a representative, or a deft. is sued in such character, see the evidence, post, "Executors," "Husband and Wife," "Heir."

[Breaches.] If the deft. pleads a plea of general performance, under which plt. assigns breaches in his replication, and deft. takes issue thereon, the burden of proving the breaches lies on plt., and which must be proved as assigned. If the deft. pleads a plea of special performance, and on which plt. takes issue, then, it should seem, the burden of proving performance lies on deft.

If the breaches are suggested on the roll, after a judgment by default, the plt. must prove the condition of the bond, and all the other facts suggested, including the breaches: 1 *Saund.* 58, d. If the breaches have been suggested on the roll, after judgment for the plt. on demurrer, some evidence must be adduced that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; and for which purpose it will suffice for the plt.'s attorney to swear that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date, without calling the attesting witness: *Pea. Ev.* 287; 2 *Camp.* 122, s. c.

[Damages.] By the common law, the penalty or security on forfeiture became the debt, and not the principal, and interest, and costs, 3 *Burr.* 1370; to remedy which, the 8 and 9 *W. 3.*, and 4 *Anne.* c. 16,

were passed. The plt. must prove the amount of the debt and damages: 2 *Saund.* 187, *a.*; 2 *N. R.* 362, *s.* The amount recoverable must depend on the amount proved: see "*Damages.*" The jury must assess them for the breaches, as in ordinary cases. On an engagement to replace stock, the plt. may estimate his damages either according to the price of stock at the day appointed for replacing it, or on the day of trial; 1 *Stark.* 218. As to interest, see "*Interest.*" It is in all cases payable on bond, though not reserved: 7 *T. R.* 124. A bond conditioned for the payment of a smaller sum bears interest from the day of payment, though it be given voluntarily, 1 *Stark.* 291, 7 *T. R.* 124; *aliter* in the case of a single bond: 1 *B. & P.* 337. Where no day of payment is expressed, interest is payable from the day of execution: 2 *Stark. Ev.* 310.

### *Evidence for Defendant.*

As to the nature of the evidence in general, and what may be given in evidence with reference to the plea pleaded, see "*Deed,*" "*Debt,*" \*such as "*Payment,*" "*Escrow,*" "*Usury,*" "*Du-* [\*324] *ress,*" "*Fraud,*" "*Infamy,*" "*Coverture,*" "*Set-off,*" &c. See those respective titles.

The deft. is at liberty to controvert the truth of the breaches suggested or assigned; and he should be prepared with evidence accordingly. See 1 *Saund.* 58, *d.*



## BOUNDARIES.

SEE INDEX.



## BY-LAWS.

*Remedy on By-Law.*] Where a by-law enacts a penalty to be incurred, when its restrictions are not complied with, debt may be supported for the recovery of it, 1 *Roll.* 366, *l.* 48, 1 *Saund.* 312, *d.*, *Company of Feltmakers v. Davis*, 1 *B. & P.* 98, or assumpsit: *ib.* 2 *Lev.* 252. But, where it is enacted that the penalty is to be recovered by debt, then debt alone can be maintained, *Com. D. By-Law, D.* 1; or it may be recovered by a distress, where the enactment of the by-law is express: *Kirk v. Nowill*, 1 *T. R.* 118; 1 *Roll.* 367, *l.* 5; *Com. D. By-Law, D.* 2.

*Pleading, &c.*] In declaring on a by-law, the liability of the deft. must distinctly appear. So, where the declaration stated merely that the penalty was incurred "under and by virtue of a certain by-law," without setting forth the charter of the company empowering them to make by-laws, it was held bad on demurrer, *Company of Feltmakers v. Davis*, 1 *B. & P.* 98, as the deft. could not negative its validity: *ib.* 100. Where the right to make a by-law is exercisable in a select part

of a corporation, that power must be shown to be in it: *the King v. Bird*, 13 East, 384; *the King v. Lyme Regis*, Doug. 158-9. So, the master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, for the use of the master, wardens, and company: *Company of Feltmakers v. Davis*, 1 B. & P. 98; *Bodwic v. Fennell*, 1 Wils. 235. But the deft.'s liability need not be particularly stated. So, where a by-law stated that deft. was to pay a certain sum quarterly, or incur a penalty of £5 per annum, a general breach will be sufficient, even on demurrer or in arrest of judgment, without setting forth the non-payment on specific quarterly days: 1 Wils. 281. A plea setting up a by-law as a defence must show the authority of the persons making it: *Company of Vintners v. Passey*, 1 Burr. 235. And, in debt on a by-law, any reasonable excuse may be given in evidence under the plea of *nil debet*: *Carth*. 483; *Cambridge v. Herring*, 1 Lutw. 402, 5; *Company of Vintners v. Passey*, 1 Burr. 239. In order to avoid a by-law, on account of its being unreasonable, it will not be sufficient to show a possible inconvenience to arise from it: the inconvenience must appear to be *probable*: *the King v. Ashwell*, 12 East, 29. Where the custom is relied upon as the foundation of an action on a by-law, it must be proved, *Hesketh v. Braddock*, 2 Burr. 1858; and, if it be not shown on the declaration, deft. may demur: *Company of Vintners v. Passey*, 1 Burr. 235. Sixty years' usage has been considered as evidence of a custom: *Selw. N. P.* 1145.

*Evidence.*] A corporation has an implied power of making by-laws; but, where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they [\*325] shall not make by-laws in any \*other cases, *p. Ld. Macclesfield*, 2 P. Wms. 209, cited *the King v. Bird*, 13 East, 379; and, though there be no express power by their charter to make them: *Com. D. By-Law, A*; *sed vide Kirk v. Nowill*, 1 T. R. 118. The power to make them may be upheld by an ancient custom; as, where the tenants of a manor make by-laws for the good order of the tenants, 1 Roll. 366, l. 16; or without a custom, where the effect of it was the public good, as the repair of churches, highways, &c. 5 Co. 68 d.; the evidence to establish which will vary according to the circumstances. See respective titles, *post*, "*Charter*," "*Corporation*." Where a by-law is pleaded, and issue taken thereon, proof that, from the time of the supposed by-law, the usage at elections has been according to such supposed law, affords presumptive evidence that there was such a law, although it cannot be produced: *Rex v. Phillips*, 1749.



## CARRIERS, ACTIONS AGAINST FOR LOSS OF GOODS.

FORM OF REMEDY, 325.—*Assumpsit*; *ib.*—*Case*, *ib.*—*Trover*, *ib.*

FORM OF PLEADINGS, 326.—*Declaration*, *ib.*—*Plea*, *ib.*

PRECEDENTS.—*Declaration against Carrier by Land for loss of a Parcel*, 327.—*Declaration against Carrier by Water for not carrying Plaintiff*, 328.

**EVIDENCE FOR PLAINTIFF.**—*Proof of Defendant's being a Carrier, as stated, 328.*—*Proof of Delivery of Goods to him, 329.*—*Proof of his Duty and Liability, 330.*—*Proof of Breach of Duty and Negligence, 331.*—*Proof of Value of Goods, ib.*

**EVIDENCE FOR DEFENDANT.**—*Fraud, 331.*—*Notice, &c., restricting Liability, 331 to 334.*—*Accident, 334.*—*Plaintiff's Negligence, ib.*—*Illegal Carriage, ib.*

**COMPETENCY OF WITNESSES, 334.**

### *Form of Remedy.*

*Assumpsit* lies against a carrier for the breach of his express or implied contract, to take due and proper care of goods entrusted to him to carry for the plt. : 4 *Mod.* 92 ; 2 *Salk.* 440 ; *Ross v. Johnson, Burr.* 2825. But, as the liability of carriers is founded on common law, as well as on the contract, *case* is sustainable, and, in many instances, is a preferable remedy, especially where there is any doubt as to the number of the persons to be made defts.; when, by proceeding in *case*, a plea in abatement for the nonjoinder of parties may be avoided, and the joinder of too many defts. will form no ground of nonsuit : *Govett v. Radnidge, 3 East, 62* ; *Ansell v. Waterhouse, 2 Chit. Rep. 1* ; *Bretherton v. Wood, 3 B. & B. 54, 6 Moore, 141, 154, 8, s. c.* ; *Leslie v. Wilson, ib., 171.* *Case* is also preferable, where there is evidence of a conversion, as a count in *trover* may be added, *ib.* ; and a defence of a set-off, *Fletcher v. Dyche, 7 T. R. 36*, or of deft.'s bankruptcy, *Parker v. Norton, 6 T. R. 695, 1 Marsh. 184*, may be sometimes thereby avoided. When the plt. sues in *case*, the action must be against deft. on his common-law liability : 6 *Moo.* 54 ; 2 *N. R.* 345.

*Trover* lies against a carrier for an act done, though not for a mere omission ; as, where by mistake he delivers goods to a wrong person, *trover* lies, but not if he lose them by accident : *Pinkerton v. Caslon & ors., 2 B. & A. 702.* *Trover* lies, if the carrier refuse to deliver the goods when he has them in his possession, without just cause, or if he has tortiously converted the goods, as by unpacking them and stealing : *Anon., Salk. 655.* But, when the non-delivery arises from an inability to deliver the goods, as when they have been lost or destroyed by accident, \*however he may be liable to answer in another [\*326] form of action, he cannot be liable in this ; so, if he assert (falsely) that he has delivered the goods, it cannot be construed into a conversion, *Ross v. Johnson, 2 Burr. 2525, supra* ; nor, where the goods, have, in fact, never reached him, having been delivered to his servant, by whose negligence his master has been prevented from receiving them, since this cannot be construed into any conversion by him : *Taylor v. —, 2 Ld. Raym. 792.*

The action for the loss of goods should be brought in the name of the consignee of them, when they are sent at his risk (which is very usual), and not in the name of the consignor : *Dawes v. Peck, 8 T. R. 330* ; *B. N. P. 86* ; 3 *P. Wms.* 186 ; 3 *B. & P.* 582. If the consignee had no property in the goods at the time of the delivery to the carrier, the consignee should sue : *ib., Sargent v. Morris, 3 B. & A. 277.*

*Form of Pleadings.*

In a declaration in *assumpsit*, it is not necessary to commence it with an inducement of the deft.'s being a common carrier, &c. The *termini* of the journey must be correctly described; therefore, where the contract which was declared upon was represented in the declaration to be for the conveyance of goods from W., in the county of Middlesex, to T., in Essex, when, in fact, it was from Aldgate, in the city of London, to that place, he was nonsuited: *Tucker v. Crackling, & Stark. Rep.* 385. The delivery and receipt of the goods must be alleged in such a manner as to show the existence of the contract for the breach of which he declares: *Max v. Roberts, 12 East, 89*. The plt. need only state the nature of the goods delivered to deft., with a certainty of description to a common intent: thus, a "carrier's pack" has been held a sufficient description; and so, it was sufficient where the declaration stated so many "sets of gold buttons, and a set of Turkey stones and garnets;" for, to such as are conversant with those things, it is well known what a set is, and in what number the precious stones are usually placed in such sets: *Chamberlain v. Cook, 2 Vent. 78; 2 Saund. 74, a.; Jerem. Car. 182*. In stating the contract, if the carrier only limits his responsibility, that need not be noticed in pleading; but, if a stipulation be made, that, under certain circumstances, he shall not be liable at all, that must be stated, *p. Abbott, C. J., Latham v. Rutly, 2 B. & C. 22*; therefore, if the carrier excepts his liability from loss occasioned by fire or robbery, &c., it must be so stated, *ib.*; or, if he give notice that he will not pay any thing for loss of goods which exceed £5, it must be set out; but, if he give notice that he will not pay more than £5 for the loss of any goods, such exception need not be noticed: *Clarke v. Gray, 6 East, 563*. It is sufficient to allege the reward generally, without showing what reward: *Dalston v. Janson, 1 Ld. Raym. 58; 13 East, 114, a. Chit. Pl. 357*. The breach must be stated with precision: *Mayor v. Humphries, 1 C. & P. 251*. An allegation, that the deft. so carelessly and negligently conducted himself, that by means thereof the goods were lost, is of such a nature as to admit of proof of gross negligence: *Smith v. Horne, 2 Moo. 18, s. c.; 3 Taunt. 144*.

In a declaration in *Case*, it is not necessary to state the custom of the realm as to carriers, as the action is founded on the general obligation of the law, and *ex delicto* for acting against it: *Ansell v. Waterhouse, 2 Chit. Rep. 3, 4*. But the declaration should show the deft. was a common carrier, or some other fact, to show his common-law duty and liability, *ante, 324*. The declaration must show a duty. A count had better be inserted, stating defts. to be owners of a general conveyance, carrying the goods of all indiscriminately; otherwise, a plea in abatement may be made available: *Chamberlain v. Cooke, 2 Vent. 78*. The other points as to a declaration in *assumpsit* will be here applicable: *supra*.

*Plea.*] This must, in general, be the general issue: *post, "Case."*

## \*Precedents.

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## AGAINST A CARRIER FOR LOSING A PARCEL.

(Commencement of Declaration, post, "Declaration.") For that whereas the said deft., before and at the time of the delivery of the parcel, goods, and chattels to him, as hereinafter next mentioned, was, and thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, on a certain journey, to wit, from ——— to ———, to wit, at, &c. And whereas, also, the said plt., whilst the said deft. was such common carrier, as aforesaid, to wit, on, &c., to wit, at, &c., (*the venue*), caused to be delivered to him, the said deft., and the said deft. then and there accepted, and received of and from the said plt., a certain parcel, containing divers goods and chattels, to wit, &c. (*specify the articles fully and particularly*), of the said plt., of great value, to wit, of the value of £—, to be safely and securely carried and conveyed by him, the said deft., from ——— aforesaid to ——— aforesaid, and there, to wit, at, &c. aforesaid, safely and securely to be delivered for the said plt., for certain reasonable reward to him, the said deft., in that behalf. Yet the said deft., not regarding his duty as such common carrier, as aforesaid, but contriving, and fraudulently intending, craftily and subtly to deceive, defraud, and injure the said plt. in this behalf, did not, nor would, safely or securely carry or convey the said parcel and its contents aforesaid, from ——— aforesaid to ——— aforesaid, nor there, to wit, at ——— aforesaid, safely or securely deliver the same for him, the said plt.; but, on the contrary thereof, he, the said deft., so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself, in the premises, that by and through the carelessness, negligence, and default of the said deft. in the premises, the said parcel and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the said A. B., to wit, at, &c. aforesaid. And whereas, also, heretofore, to wit, on, &c. aforesaid, at, &c., aforesaid, to wit, at, &c. aforesaid, the said plt., at the said deft.'s special instance and request, caused to be delivered to the said deft. a certain other parcel, containing certain other goods and chattels, to wit, &c., of him, the said plt., of great value, to wit, of the value of £—, to be taken care of, and safely and securely carried and conveyed by him, the said deft., on a certain journey to ——— aforesaid, and there, to wit, at ——— aforesaid, to be safely and securely delivered by the said deft. for the said plt., within a reasonable time then next following, for certain hire and reward to the said deft. in that behalf; and, although the said deft. then and there accepted, and had and received, the said last-mentioned parcel and its contents aforesaid, for the purpose aforesaid, and undertook the carriage, conveyance, and delivery thereof, as aforesaid, within such reasonable time, as aforesaid, and although a reasonable time for the carriage, conveyance, and delivery thereof, as aforesaid, hath long since elapsed, yet the said deft., not regarding his duty in that behalf, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plt. in this respect, did not, nor would, within such reasonable time, as aforesaid, or at any time afterwards (although often requested so to do), take care of, or safely or securely carry and convey, the said last-mentioned parcel and its contents aforesaid, on the said journey to ——— aforesaid, nor there, to wit, at ——— aforesaid, safely or securely deliver the same for the said plt., but hath hitherto wholly neglected and refused so to do; and by means of the negligence and improper conduct of the said deft. in that behalf, the said last-mentioned box and its contents aforesaid have not yet been delivered to or for him, the said deft., at ——— aforesaid, or elsewhere, and are wholly lost to the said plt., to wit, at, &c., aforesaid. [Add a count in trover, if there be any evidence of a conversion, 3 East, 70, ante, 326. Add a count, merely stating that deft. had the custody of the goods, to be taken care of by him, and that he took such bad care thereof, that they became wholly lost to plt.]

DECLARATION IN ASSUMPSIT AGAINST CAPTAIN OF VESSEL FOR NOT CARRYING PLY. AS PASSENGER THE WHOLE VOYAGE, BUT FOR ONLY PART, WHEREBY PLY. WAS OBLIGED TO PROCURE ANOTHER CONVEYANCE.

\* For that whereas the said deft., before and at the time of the making of his promise and undertaking hereafter next mentioned, was the master or commander of a certain ship or vessel, called and known by the name of the ———, and which said ship or vessel was then lying and being in certain parts beyond the seas, to wit, at Bengal, and bound on a voyage from thence to England, to wit, at, &c. (*venue*). And whereas, also, the said deft., so being the master and commander of the said ship or vessel, as aforesaid, thereupon, heretofore, to wit, on the 20th Nov. 1820, to wit, at London aforesaid, in the parish and ward aforesaid, in consideration that plt., at the special instance and request of the said deft., would pay to him, the said deft., a certain sum of money, to wit, the sum of £—, of lawful money, &c., for the use and occupation of the starboard side of the great cabin of the said ship (*according to the fact*), during her expected voyage from ——— aforesaid to England aforesaid, the said deft. then and there faithfully promised the said plt. to suffer and permit her to have the use and occupation of the starboard side of the said

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cabin of the said ship or vessel, during the said voyage, and to carry and convey, and cause and procure to be carried and conveyed, her, the said plt., in and on board of the said ship or vessel, from — aforesaid to England aforesaid, on the said voyage, in a reasonable time then next following. That the said plt., confiding in the said promise and undertaking of the said deft., afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*), aforesaid, did pay to the said deft. the said sum of money, and did take possession of the said starboard side of the great cabin of the said ship or vessel, and was then and there accepted and received by the said deft. as a passenger in and on board of the said ship or vessel, to be carried and conveyed in and on board of the said ship or vessel from — aforesaid to England aforesaid. Yet the said deft., not regarding his said promise, &c., did not nor would carry or convey, or cause or procure to be carried and conveyed, the said plt. as a passenger in and on board of the said ship or vessel, from — aforesaid to England aforesaid, in a reasonable time then next following; but, on the contrary thereof, the said deft., afterwards, to wit, on, &c., in certain parts beyond the seas, to wit, at —, that is to say, at, &c. (*venue*), aforesaid, wrongfully and injuriously hindered and prevented the said plt. from having the free use, occupation, and enjoyment of the said cabin, as she of right, by means of the premises, ought to have had; and then and there wholly neglected and refused any longer to proceed with the said ship or vessel on the said voyage, or to carry or convey, or cause or procure to be carried or conveyed, the said plt. therein, or in any other ship or vessel, during the residue of the said voyage, or in any manner whatsoever to carry or convey her to England aforesaid. That, by means of the said premises, the said plt. was then and there put to great inconvenience, trouble, and expense, to wit, an expense of £300, and was forced and obliged to quit and leave the said ship, and delay proceeding to England for a long space of time, to wit, for the space of three months then next following, and was put to great expense of her moneys, to wit, the expense of £300, in and about the procuring a passage and conveyance in a certain other ship or vessel to England aforesaid, and was also hindered and prevented from following her lawful and necessary affairs and business in England aforesaid, and lost and was deprived of the said money so paid to the said deft., as aforesaid, and was otherwise much injured and damaged, to wit, at, &c. (*venue*), aforesaid.

See other forms of declarations, *Index to 3 Chd. Pl., tit., "Carriers."*

### *Evidence for Plaintiff.*

*Proof of Defendant's being a Carrier.]* It has been held, that any person undertaking for hire to carry the goods of all persons indifferently, is to be considered a *common carrier*; *Gisbourn v. Hurst*, 1 *Salk.* 249, *Cro. Eliz.* 596; as, the owners and masters of vessels, *Morse v. Slue*, 2 *Lev.* 69; a wharfinger conveying goods from his wharf to the vessel in his own lighters, *Maving v. Todd*, 1 *Stark.* 72; hoymen, *Wardell v. Mousiliyan*, 2 *Esp. Rep.* 693; bargemen, *Rich v. Kneeland*, [\*329] *Cro. J.* 330; the proprietors of stage coaches, or of mail coaches, carrying goods, passengers, &c., *White v. Boulton*, *Pea. Rep.* 80; or of common waggons, *Jer. Car.* 11, &c., *Coggs v. Bernard*, 2 *Ld. Raym.* 918, *Morse v. Slue*, *T. Raym.* 220, 1 *Salk.* 249, 282; or of a stage van, *Rex v. Middleton*, 3 *B. & C.* 164. Where the deft. is not a *common carrier*, but has expressly undertaken to carry the goods safely, it is necessary for the plt. to prove what the terms of the deft.'s undertaking were; and he will be liable for any damage which he sustains, arising out of a breach of such undertaking: *Robinson v. Dunmore*, 2 *B. & P.* 416. These facts are generally matter of parol evidence, and may generally be proved by the agents or servants who received or assisted in conveying the goods.

To prove the ownership of several defts., and their liability as common carriers for the loss of a parcel sent by their coach, the registry-book kept in Somerset House of licenses granted is insufficient, unless they be shown to be connected therewith: *Strother v. Willan*, 4 *Camp.* 24.

*Proof of Delivery of Plaintiff's Goods, &c.*] Plt. must prove the delivery of the goods lost to the carrier, either in person, or to the servant regularly employed by him in the business. In an action against the proprietor of a stage coach for the loss of a parcel, it is sufficient to prove a delivery of it to the driver : *Williams v. Cranston*, 2 Stark. 82. A promise made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, cannot, however, be adduced against the carrier as evidence of the delivery, unless the book-keeper be shown to be his general agent : *Olive v. Eames*, 2 Stark. 181. Where the goods are left for a carrier in an inn-yard or warehouse, at which other carriers put up, it will not be considered a delivery, so as to charge him, without a special notice of their being so delivered, or some previous instructions to that effect, *Selway v. Holloway*, 1 *Ld. Raym.* 46 ; as, that the carrier advertised or notified that they were to be delivered there, or that deft. was in the habit of receiving goods there, *Edwards v. Sherratt*, 1 *East*, 604 ; or unless the goods be booked, or a receipt taken : *Buckman v. Levi*, 3 *Camp.* 414. Where the carriage is by means of the post-office, it will not be a sufficient delivery to make the consignee liable for the loss, if the letter was only given to a bell-man : *Hawkins v. Rutt*, *Pea. Rep.* 486. The delivery may be proved by the witness who left or delivered them, and he must say where he delivered them. If he got a receipt for them, he should be subpoenaed to produce and prove it.; and, if they were entered in a book kept by the carrier, notice should be given him to produce it. If the goods were sent by a coach, notice to produce the way-bill should be given. It also should be proved what orders were given at the time as to the carriage of the goods and place of destination, and what was the written direction upon them. Where the carriage of goods does not exceed £20, the receipt of the carrier will be received in evidence without a stamp, though the value of the goods exceeded that sum : *Latham v. Rutley*, *R. & M.* 13 ; *Chadwick v. Sills*, *ib.* 14.

*Proof of Plaintiff's Property in the Goods.*] In the case of an implied contract, property in the goods must be proved to be in the plt., which may be done in the usual way, by evidence of possession and acts of ownership, as, by producing the bill of lading, *Brown v. Hodgson*, 2 *Camp.* 36 ; because, by delivery to a carrier, the property of the goods is generally held to vest in the vendee or consignee, when he alone would be entitled to sue : *Dawes v. Peck*, 8 *T. R.* 300 ; 3 *B. & P.* 584. But where, on the production of the bill of lading, it appears that the shippers of the goods were agents of the consignees, and had paid the freight, *Ld. Ellenb.* held that a sufficient privity of contract was established to enable the plts. to recover : *Joseph and others v. Knox*, 3 *Camp.* 321. Where, however, no freight was paid by [\*330] the consignor, and the terms of the bill of lading were that the goods were shipped "for and on account of the consignee," the consignor could not maintain an action for the loss, no property being recognized in him : 2 *Camp.* 36 ; *Jacobs v. Nelson*, 3 *Taunt.* 423 ; 5 *Burr.* 2681. The payment of freight seems to have been considered by *Lawrence, J.*, in 3 *Camp.* 640, as making no difference in the right of the consignor to maintain an action against a carrier. In *Moore and others v. Wilson*,



the plt. averred, that the hire of the carrier was to be paid by him ; but the proof was that the hire was to be paid by the consignee. *Buller, J.*, said " that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the vendor and the carrier, the former of whom was by law liable ;" and the plt. recovered : 1 *T. R.* 659. When, by a bill of lading, the captain was to deliver the goods for the consignor, and, in his name, to the consignee, and, at the time of shipment, the consignee had no property in the goods, it was held, that an action against the shipowners, for damage done to the goods, must be brought in the name of the consignor, and that although the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship : *Sargen v. Morris*, 3 *B. & A.* 277. And, where the plts. consigned goods, according to an order received, to a person they did not know, and who afterwards appeared to be a swindler, but who got possession of them by the carrier's negligence, it was held that they might maintain an action against the carrier, as the property had not passed to the consignee : *Duff v. Budd*, 6 *Moo.* 469.

When an express contract has been entered into, after proof of such contract, no evidence of property or ownership is requisite : *Gibbon v. Paynton*, 4 *Burr.* 2064 ; *Dawes v. Peck*, 8 *T. R.* 330.

*Proof of Carrier's Duty and Liability.*] Common carriers are, by the common law, bound to receive and carry the goods of the subject for a reasonable hire or reward, 2 *Show*, 327, 81, 129 ; and their liability is like that of insurers ; and they are bound to take due care of goods in their passage, and also to deliver them safely, *Golden v. Manning*, 2 *W. Bl. R.* 916 ; and, even if they were not so bound by any general course of trade, they would undoubtedly be bound to give notice of the arrival of the goods to the persons to whom they are consigned, *ib.* Hence it will be considered a gross negligence, wherever damage is occasioned by the goods lying in their warehouses, whether they receive the portorage to their own use or not : said *per Buller, J.*, in *Hyde v. Trent and Mersey Navig. Com.* 5 *T. R.* 389. Thus, where a parcel of goods was directed to " Mr. James Parker, High Street, Oxford," who, on being applied to, said he expected no such parcel, and it was afterwards given to a person who called at the deft.'s office, claiming it as his, and who paid the carriage for it, it was held, however, that the carrier was responsible : *Duff v. Budd*, 6 *Moo.* 469. And even the known use of a hoyman to ply at a particular wharf will not render a delivery of the goods at that wharf a discharge of his duty : *Wardell v. Thourillyan*, 2 *Esp. Rep.* 693 ; *Cobban v. Downe*, 5 *Esp. Rep.* 41. And, when the carrier acts under a bill of lading, he must conform to the terms of it. Thus, where goods have been brought by ships from foreign countries, the bill of lading is merely a special undertaking to carry from port to port : according, therefore, to the established usage of trade, a delivery on the usual wharf is such a delivery as will discharge the owners : *Hyde v. Trent and Mersey Navig. Com.*, 5 *T. R.* 389. In the Thames, the master's liability, by the custom of the trade, continues whilst the goods are delivering into a lighter sent by the consignee to receive them, until the landing is completed : *Catley v. Wintringham*,

*Pea. Rep.* 140. It is said, that every thing is a negligence which the law does not excuse; and, that to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes \*against the carrier, unless he [\*331] shows that he is excepted from the liability he would otherwise incur, by proof of the injury having been done by the act of God, or by the king's enemies.

*Proof of Loss of Goods, and Deft.'s Negligence.*] The plt. having proved the deft.'s receipt of goods, on a contract to deliver them safely at some other place, it seems to be incumbent on the deft. to prove the performance of his promise. To support an averment of loss, it is enough for the plt. to show that the goods, in fact, have not arrived: *Tucker v. Cracklin*, 2 *Stark.* 385; *Samuel v. Darch*, *ib.* 60. At all events, slight evidence of that fact would be sufficient, in the absence of all proof on the part of the deft. Thus, where the plt.'s shopman was called, who stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, *Hullock, B.* held it sufficient to call on the defts. to prove a delivery: *Griffiths v. Lee*, 1 *C. & P.* 110.

*Proof of the Value of the Goods, and Damages.*] Plt. must also prove of what the goods consisted, and their value, which may be done by the person who packed them.

The amount of damages depends upon the extent of the carrier's liability being established to answer for the whole value, or to the extent to which he has succeeded in limiting his responsibility by the terms of his notice: *Hutton v. Bolton*, 1 *H. Bl.* 229. If no fraud be established on the part of the carrier, the presumption will be against the plt.'s demand, unless there be clear proof of the value of the goods lost; but, if the conduct of the carrier be at all tainted with fraud, a contrary rule will hold: *Clunnes v. Pezzey*, 1 *Camp.* 8, and note. See post, "*Goods Sold and Delivered.*"

### *Evidence for Defendant.*

Deft. may prove that his responsibility and control over the goods as a carrier has ceased, by showing that they have reached their place of destination. Thus, where a carrier, having conveyed the goods to the place where another carrier was to take them up, deposited them in his own warehouse, for the convenience of the owner of the goods, the latter carrier not having arrived, it was held, that the former was not liable for a loss occasioned by the destruction of the goods by fire whilst in the warehouse: *Garside v. the Trent and Mersey Navig. Co.* 4 *T. R.* 581. But, in order to discharge a wharfinger, who undertakes to ship goods, from responsibility for goods left with him to be sent coastwise, he must prove a delivery to the mate, or some other officer of the ship, by which they are to be conveyed: *Leigh v. Smith*, 1 *R. & M.* 224.

*Fraud by Plaintiff.*] Whenever the carrier can show that the consignor of goods is guilty of fraud, he will be thereby discharged for the loss of the property sent by his conveyance: *Tyly v. Morrice*, *Carth.* 485; *Gibbon v. Paynton*, 4 *Burr.* 2299. And the maxim, *ex dolo*

*malo actio non oritur*, has been so strictly adhered to by the courts, *Batson v. Donovan*, 4 B. & A. 21, that it has been considered unfair on the part of the plt. to refrain from disclosing the value of a parcel, the risk of conveying which the carrier has endeavoured to guard himself against by a public notice: *Bignold v. Waterhouse*, 1 M. & S. 255; *Harris v. Packwood*, 3 Taunt. 264, *post*. And where it appears that the contract is made under such circumstances, and at such a time, as would negative that the goods were delivered in the usual course of dealing as a common carrier, he will be discharged from liability in that character: *Edwards v. Sherratt*, 1 East, 604. And see further, *post*, 834, as to plt.'s negligence.

[\*332] *\*Notice, &c. restricting Carrier's Liability.*] Deft. may also give in evidence as a defence, that plt. had previous notice that he had restricted his liability, and that he would not be answerable for the whole or part of the value of any goods, or of goods of any particular description, delivered to him, unless informed of their value, and paid for accordingly; in which case it will be presumed that the owner of the goods agreed to such limitation of deft.'s liability, and the carrier will not be liable in case of a loss not occasioned by his fraud, misfeasance, or carelessness, but arising from one of the various accidents to which his employment is subject: *Clay v. Willan*, 1 H. Bl. 208; *Izett v. Mountain*, 4 East, 371; *Chit. Cont.* 152; *Maving v. Todd*, 1 Stark. 73.

The burden of proof of plt.'s knowledge of deft.'s notice, lies on the deft. In order to affect the plt. with the deft.'s notice, it is not essential that there should be any direct and immediate communication, if the notice be a general one, *Gibbon v. Paynton*, 4 Burr. 2298, if the means adopted are such from whence a jury may reasonably infer that a knowledge of its contents was notified to the person dealing with deft.: *Evans v. Soule*, 2 M. & S. 1; *Clay v. Willan*, 1 H. B. 298. The deft., however, must fix the plt. with a knowledge of the particular notice set up, by clear and explicit evidence; and it will be sufficient for the deft. to show that the notice was affixed in a conspicuous situation in the office to which the goods were brought by plt. or his servant, *Leeson v. Holt*, 1 Stark. 186, provided the party can read, *Davis v. Willan*, 2 Stark. 279, *ib.* 53; and the notice must be in *such large characters*, that the person delivering the goods cannot fail to read it, without gross indifference and negligence: *Clayton v. Hunt*, 3 Camp. 27. Nor is the notice sufficient, if a bill be posted up, blazoning the advantages of his conveyances, and stating the notice restricting his liability in small characters at the bottom of such bill: *Butler v. Heane*, 2 Camp. 415. A notice in the office will not be regarded as the terms of the contract, if the carrier circulate hand-bills less restrictive of his liability, *Cobden v. Bolton*, 2 Camp. 108; and, where two notices are given, the carrier will be bound by that which is least beneficial to himself: *Munn v. Baker*, 2 Stark. 255. A notice in the coach-office, will be insufficient, if the goods were not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods, *Clayton v. Hunt*, 3 Camp. 27; or at an intermediate stage between two places, from each of which the carrier conveys goods to the

other, although notices are suspended at each extremity of the journey : *Gouger v. Jolly, Holt, C. 317.*

Notice to the vendor of goods, that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent, *Maving v. Todd, 1 Stark. 72*; the former having, in such cases, an implied authority to insure the goods as may be necessary : *Clarke v. Hutchins, 14 East, 476.* So, if an agent send a parcel by a common carrier, who has previously given a notice restrictive of his liability to the principal, the carrier is not responsible, though the agent was not apprised of such notice : *Mayhew v. Eames, 3 B. & C. 601*; *5 D. & R. 484*; *Alfred v. Horne, 3 Stark. 136.* A notice may also be sufficiently conveyed by hand-bills, *2 Camp. 107, 415,* printed cards, or by advertisements in the newspapers; and, in the case of the hand-bills or printed cards, delivery to the person should be proved. But, where the notice was conveyed by an advertisement contained in the newspaper, it must be proved that he read such advertisement, as it will not be presumed that he knew of such notice, though it be proved that he had taken in the paper for three years wherein the notice had been advertised weekly : *Rowley v. Horne, 3 Bing. 2*; *contra, Leeson v. Holt, 1 Stark. 186.*

Knowledge of a notice may be brought home to a party by other means. Thus, an acquiescence in the loss of parcels sent by a carrier, who had published a general notice, and a direction to the person sending the parcels to insure them for the future, would be sufficient evidence to \*show a knowledge of the notice : *Roskell v. Waterhouse, 2 Stark. 461.* The effect of a notice will not be destroyed, where it restrains the liability of the debts, to £5, unless the goods be entered and paid for accordingly, that the goods were known to the carrier to be of greater value, and that the additional rate of carriage was not demanded by him, *Marsh v. Horne, 5 B. & C. 322, Levi v. Waterhouse, 1 Price, 280*; nor that, on occasion of other losses, the carrier made allowances to the plt. for damages, without inquiring into the cause : *Evans v. Soule, 2 M. & S. 1.* [\*333]

The extent of the carrier's defence must be limited by the terms of his notice, which may be collected from the following. Where the notice was, "Valuable goods will not be accounted for, if lost, of more than £5 value, unless entered as such, and one penny insurance for each pound value paid on the delivery," &c. &c., the court held, that the tenor of these conditions seemed to be, that the debts. were not liable to to any extent, unless the parcel had been entered and paid for as valuable; and the plts. neither recovered to the extent of £5, nor yet the price paid for carriage and booking : *Clay v. Willan, 1 H. Bl. 298.* Where the notice was, that the carrier would not be answerable for any goods committed to his care above the value of £20, unless he was paid in proportion to the risk, his liability to that extent was held to be admitted, and he was allowed to pay that sum into court : *Yate v. Willan, 2 East, 128, infra.* Where the notice purported, that the proprietors would not be answerable for more than £5, unless booked and paid for accordingly, it was held, that the payment of that sum into court was to be considered an admission of the contract to be liable to that extent :

*Izett v. Mountain*, 4 East, 371. Where the general notice was, the proprietors will not be accountable for any parcels, &c., of more value than £5, unless entered as such, and paid for accordingly, it was held, that the plt., under the terms of such a contract, was not entitled to recover any thing, the goods being above the value: *Nicholson v. Willan*, 5 East, 507, *supra*. Where the notice was, "Take notice, that no more than £5 will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly," the plt. was allowed to retain his verdict for £5, as a limited amount of damages recoverable by him under the conditions of this contract: *Ellis v. Turner*, 1 T. R. 531. Where the notice was, "Take notice, that the proprietors, &c., at this office, will not be accountable, &c., for any goods, or any package whatever, if lost or damaged, above the value of £5, unless insured and paid for," &c., the court said, they could not withhold giving effect to those terms in the notice, by which, inasmuch as the goods in question were above the value of £5, and not insured or paid for at the time of the delivery, the defts. could not be held accountable at all; and the verdict even for £5 was set aside, and a nonsuit entered: *Clarke v. Grey*, 6 East, 564. And a notice, that a carrier will not be liable for goods of a certain description, or any other goods, above the value of £5, unless insured, and their value to be stated to him, does not apply to articles which do not fall within the goods described, and, from their appearance, evidently exceed the small specified value: *Beck v. Evans*, 3 Camp. 267. And a strict compliance with the notice is dispensed with, by his being informed of the nature of the goods, and their value, and told to charge what he pleased, provided they were taken care of: *Wilson v. Freeman*, 3 Camp. 527.

The notice will afford no defence to the carrier in cases where he is guilty of fraud or of gross negligence: *Lyon v. Mells*, 5 East, 428; *Beck v. Evans*, 16 East, 244; *Birket v. Willan*, 2 B. & A. 356; *Duff v. Budd*, 3 B. & B. 177. The degree of negligence which will render him liable is a question of fact for the jury, *Smith v. Horne, Holt*, C. 643; or, if he be guilty of any misfeasance, or wrongful act, contrary to his undertaking; as, where the goods were lost or stolen in consequence of the carrier's leaving his cart in an unprotected state whilst delivering goods, 2 Moo. \*18; or if he neglect to forward the goods, *Garnett v. Willan*, 5 B. & A. 61, or send them by another coach or conveyance than that agreed on, *ib.*, 53, *Sleat v. Fagg*, *ib.* 342 (but not if they are booked by another coach to that which plt. expected, *Nicholson v. Willan*, 5 East, 507), or beyond the place of destination, 4 Price, 31; or where he fails to deliver the goods within a reasonable time: *Hyde v. Trent. Nav. Co.*, 5 T. R. 389. And the notice will not protect deft., where the parcel was lost in consequence of coachman's being intoxicated: *Bodenham v. Bennett*, 4 Price, 31.

*Loss by inevitable Accident, &c.*] It is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel, in order to save the passengers in a storm: 1 Rol. Ab. 79. In order to prove a destruction or loss by the king's enemies,

the goods having been taken by an armed force, it must be proved that they were taken by robbers or pirates: *Forward v. Pittard*, 1 T. R. 33.

*Loss resulting from Plaintiff's Negligence.*] The deft. may also show in defence that the loss has resulted from the improper and negligent manner in which the goods have been packed or delivered by the plt. Where a carrier gave a receipt for a dog, which was afterwards lost, it was held to be no defence that the dog had not been delivered in a state of security, there being no collar about his neck, but only a cord. *Ld. Ellenb.* ruled that, after a complete delivery to the deft., the property remained at his risk, and he was bound to use proper means for securing it: *Stuart v. Crawley*, 2 Stark. 323.

*Illegal Carriage.*] Where the carrier sets up as a defence to the loss of a parcel that the carriage of it was illegal, he must adduce sufficient *prima-facie* evidence to lay the foundation for such objection: *Bennett v. Clough*, 1 B. & A. 461. And where, in case against a carrier for the loss of goods delivered to him at Dublin, to be conveyed to Liverpool, it was objected for the deft., that, unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void, it was held that illegality is never to be presumed, and that the deft., in order to raise the objection, was bound to prove that the goods were not entered: *Sissons v. Dixon and others*, 5 B. & C. 758.

#### COMPETENCY OF WITNESSES.

The carrier's book-keeper is a good witness for him, *Spencer v. Goulding*, Pea. C. 129; and an appointed receiver of the goods may be a good witness for the carrier, as he is often of necessity the only agent on the part of the carrier interfering in the contract, and need not be released, unless where the injury arises from his own negligence, and an immediate interest is thereby created: *Spitty v. Bowen*, Pea. Rep. 53; *Lay v. Holock*, *ib.* 101. And it has been held that a carrier employed by A. to carry a sum of money to B., is a good witness, from necessity, without a release, in an action for money had and received brought by A. against C., to prove that, by mistake, he delivered it to C.: *Barker v. Macrae*, 3 Camp. 144. And, wherever a release is requisite, it suffices if given by one of several carriers in partnership: *Hockless v. Mitchell*, 4 Esp. Rep. 86.



#### CASE, ACTION ON THE.

[\*335]

**WHEN THE PROPER FORM OF REMEDY.**—*Nature of the Remedy, and when it lies, in general*, 335.—*When a concurrent Remedy with other Actions*, 337.—*The Advantages of this Form of Remedy over others*, 338.

**FORM OF PLEADINGS.**—*Declaration*, 338.—*Inducement*, *ib.*—*Statement of the Matter or Thing affected*, *ib.*—*Plaintiff's Right or Interest affected*, 339.—*The Injury*, 343.—*Variance*, 344.—*Damages*, *ib.*—*Plea*, *ib.*—*When to plead specially*, *ib.*

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EVIDENCE FOR PLAINTIFF.—*Under the General Issue*, 345.—*Inducement*, 346.—*Plaintiff's Interest affected*, *ib.*—*What Interest necessary to maintain the Action*, *ib.*—*The Injury*, 348.—*That Defendant committed it, and herein against whom Action lies*, *ib.*—*The Damages*, 352.—*Under Special Plea*, *ib.*

EVIDENCE FOR DEFENDANT, 352.

### *When the proper Form of Remedy.*

*Nature of the Remedy, and when it lies, in general.*] An action on the case, though, in its most comprehensive signification, it includes an action of assumpsit, as well as an action arising on a tort, at the present time is only understood as meaning an action for a tort, arising out of the special circumstances of the case: see 1 *Chit. Pl.* 123. It lies in general to recover damages for torts not committed with force actual or implied, or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential, or where the interest in the property was only in reversion; in all which cases trespass is not sustainable: see *Ward v. Macauley*, 4 *T. R.* 489; *Gordon v. Harper*, 7 *ib.* 9. *Shadwell v. Hutchinson* 4 *Carr. & Payne*, 333. And the party may recover damages for such injury, whether it be to the absolute or relative rights of persons, or to personal or real property in possession or reversion, or to real property, corporeal or incorporeal.

In cases where there is no ground of action except the trespass, case will not lie; yet, where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case; as, in trover, the conversion may be the actual taking of the goods, yet there the trespass may be waived; and, in other cases, that which is an aggravation of the trespass may be the subject of an action on the case; *per Holroyd, J., Moreton v. Hardern*, 4 *B. & C.* 228; *Pitts v. Gainer*, 1 *Salk.* 10; *Wallace v. King*, 1 *H. Bl.* 13. And, though trespass is the proper remedy when an injury is inflicted by the wilful act of the deft., yet case lies where the act is negligent, *Moreton v. Hardern*, 4 *B. & C.* 227; *Daniels v. Potter et al.*, 4 *Carr. & Payne*, 262; and it would seem that, where an act cannot be prevented, in consequence of antecedent negligence, case will lie, though it appears to be wilful at the time, and that it is a question for the jury: 4 *B. & C.* 229; *Ogle v. Barnes*, 8 *T. R.* 190-1. Thus, it was held that case was the proper remedy where, in an action against three coach proprietors, it appeared that one was driving at the time *when the accident happened*, and the jury found that it happened through *his negligent driving*: *Moreton v. Hardern*, 4 *B. & C.* 223; *Rogers v. Imbleton*, 2 *N. R.* 118. And it has been held that, if one ship, under the [\*336] care of a \*pilot, but while the owner is on board, run against another, the remedy against the owner is case, and not trespass: *Haggett v. Montgomery*, 2 *N. R.* 446. In *Leame v. Bray*, 3 *East*, 593, it was held that trespass lay where one accidentally drove his car-

riage against another's; but *Hailey, J.*, in 4 *B. & C.* 226, says, the court did not decide that an action on the case would have been improper; and the case of *Lotan v. Cross*, 2 *Camp.* 464, seems to have gone no further. And, in cases where the injurious act is the immediate result of the force originally applied by the deft., it is the subject of an action of trespass, *Scot v. Shepherd*, 4 *Wils.* 403, 2 *W. Bl. R.* 222, s. c., *Turner v. Hawkins*, 1 *B. & P.* 472; as, if the deft. incited his dog to bite another, or let loose a dangerous animal, *Leame v. Bray*, 3 *East*, 595, 12 *Mod.* 333; or if, in the act of throwing a log into the public street, it hurt the plt., *Reynolds v. Clarke*, 1 *Str.* 636; or if a lighted squib be thrown into a market-place, and afterward thrown about by others in self-defence, and ultimately hurt the plt., the injury is considered immediate, and the action should be trespass. See cases on this subject, cited at length, 1 *Schw. N. P.* 444.

This action lies in all cases of consequential injury or damage, *ex delicto*, to persons individually, or to personal property; as, for special damage arising from a public nuisance (see tit. "Nuisance"), or keeping mischievous animals. And, for injuries to a person arising from regular process of a court of competent jurisdiction, case is the proper form of remedy, and trespass does not lie: as, for a malicious arrest, *Bell v. Broadbent*, 3 *T. R.* 185, *Johnstone v. Sutton*, 1 *ib.* 535, *Cooper v. Booth*, 3 *Esp. Rep.* 135, *Gyfford v. Woodgate*, 11 *East*, 297, *Wetherden v. Embden*, 1 *Camp.* 295; or for a malicious prosecution, *Elsee v. Smith*, 2 *Chit. Rep.* 304 (see "Malicious Arrest and Prosecution.") Case lies concurrently with trespass, where the proceeding is in a court having no jurisdiction, where the proceeding is malicious and unfounded, *Goslin v. Wilcock*, 2 *Wils.* 302. But, where the process is irregular, trespass is the proper form, as, where a justice of the peace maliciously and irregularly grants a warrant against a person for felony, without an information on oath, the remedy is in trespass, and case does not lie, *Morgan v. Hughes*, 2 *T. R.* 225, *Elsee v. Smith*, 2 *Chit. Rep.* 304; and, though case lies for maliciously issuing a commission of bankrupt, *Chapman v. Pickersgill*, 2 *Wils.* 145, yet trespass is a concurrent remedy, for, the plaintiff not being subject to the bankrupt laws, the commissioners could have no jurisdiction, in which case trespass is always sustainable, provided the injury be forcible and immediate, *Perkins v. Proctor*, 2 *Wils.* 382, 4; *Doswell v. Impey*, 1 *B. & C.* 163. \*Case is also the proper form for injuries to rights not tangible, and consequently not liable to be affected by force, as health, reputation, &c., as in cases of libel and slander (see those titles), improper or unskillful treatment of surgeons, &c.: *Seare v. Prentice*, 8 *East*, 348, *Shields v. Blackburne*, 1 *H. Bl.* 161; *Slater v. Baker*, 2 *Wils.* 359. It also lies for not performing services, against bailiffs, attorneys, agents, innkeepers, &c.; against sheriffs, and justices of the peace, for refusing bail, 2 *Saund.* 61, c. d., *Osborne v. Gouch*, 3 *B. & P.* 551; and all other officers acting ministerially; in many cases of distress for rent, for false returns, for not levying goods, for escapes, rescous, &c.: see those titles. It lies against a witness for not obeying a subpoena, *Pearson v. Hes*, *Doug.* 556, 561, *Amey v. Long*, 9 *East*, 473, *Hallet v. Mears*, 13 *ib.* 17, n.; for the infringement of a patent or copyright,



&c., *Clementi v. Goulding*, 11 *East*, 244, *Roworth v. Wilkes*, 1 *Camp.* 94, 8; for negligence in riding horses, driving carriages, navigating vessels; *Jameson v. Drinkald*, 12 *Moo. Rep.* 148; for false and deceitful representations, *Adamson v. Jarvis*, 12 *Moo. Rep.* 241; for unlawfully exercising trades: which see under their respective titles.

Case lies for an injury to *real property corporeal*, where it is not immediate, but consequential; as, for nuisances of a private nature, to houses; lands, &c.; as, for fixing a spout, whereby the rain is discharged in a body upon the plt.'s land, *Reynolds v. Clarke*, 2 *Ld. Raym.* 1399,

\**Haward v. Bankes*, 2 *Burr.* 1114; carelessly and unskillfully making an excavation on deft.'s own land, near to the line and wall of his own house, against which plt.'s house was built, and injuring plt.'s house, *Brown v. Windsor*, 1 *Crompt. & Jerv.* 20; or causing plaintiff's land to be overflowed, 2 *Burr.* 1114; or where plt.'s property is only in reversion, *C. D. Action, Case, Nuisance, A.*; but, where the injury was immediate, and committed on land, &c., in the plt.'s possession, the remedy is trespass, *Shapcott v. Mugford*, 1 *Ld. Raym.* 188; and, in general, case is the proper remedy for continuing a nuisance, *Lawrence v. Obee*, 1 *Stark.* 22; for obstructing lights or air, see tit. "*Ancient Windows*;" for injuries to water courses, where plt. is not owner of the soil, but is entitled to the use of the water, *Carrington v. Taylor*, 11 *East*, 571; and by a reversioner against his tenant or a stranger, *Goodright v. Vivian*, 8 *East*, 190, *Attersoll v. Stevens*, 1 *Taunt.* 194, *Kinlyside v. Thornton*, *W. Bl. R.* 1111; for not repairing fences, *Star v. Rookesby*, 1 *Salk.* 335; or carrying away tithes, *Shapcott v. Mugford*, 1 *Ld. Raym.* 187. Where notice is given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining building rests, the party giving the notice is only bound to use reasonable and ordinary care in the work, and is not bound to secure the adjoining premises from injury, although from the peculiar nature of the soil he may be compelled to lay the foundation of the new building several feet deeper than that of the old: *Massey v. Goyder et al.*, 4 *Carr. & Payne*, 161.

For injuries to *real Property Incorporeal*, case is the proper remedy; and, as trespass cannot in general be supported where the matter affected is not tangible, case lies for disturbance of common, *C. D. Case, Disturb. A.* 1; for disturbing a decoy, *Carrington v. Taylor*, 2 *Camp.* 258; but not for frightening away game from a preserve, *ib.*, nor for disturbing a rookery, *Hannam v. Morkett*, 2 *B. & C.* 934, 4 *D. & R.* 518, *s. c.*; for obstructing a private way, *C. D. Case, Disturb. A.* 2; or public way, with special damage to plt. *M. & S.*; or plt.'s right to use a pew, the possession of which is supposed to be in the ordinary, *Stocks v. Booth*, 1 *T. R.* 430; but the pew must be annexed to a house in the parish, *Mainwaring v. Giles*, 5 *B. & A.* 356; but trespass is the proper remedy for taking away a tombstone from a church-yard, as they are the property of those who erect them, *Spooner v. Brewster*, 2 *C. & P.* 34. For disturbance of tolls, ferries, offices, franchises, markets, &c., case is the proper form of remedy.

Where a *statute* prohibits an injury to an individual, or enacts that he shall recover a penalty, case will lie, though not expressly named, *Com. D. Action on Stat. A. F.* 10 Co. 75-6, 2 *Salk.* 451, 6 *Mod.* 26; as, on 8 *Anne*, c. 14, at the suit of a landlord against a sheriff, for taking goods without paying a year's rent, *Bristow v. Wright*, *Doug.* 665, *Andrews v. Dixon*, 3 *B. & A.* 645, 7 *Price*, 690; and, on 13 *Ed.* 1, at the suit of the party robbed, against the hundred; and, where a navigation act says calls may be sued for in an action of debt or on the case, it was held to mean call in tort, *Huddersfield Canal Comp. v. Buckley*, 7 *T. R.* 36; and a party can only sue on 43 *G.* 3, c. 141, in case, *Massey v. Johnstone*, 12 *East*, 67. Where a stat. gives a remedy in the affirmative, without a negative expressed or implied, the party may still use his old remedy at common law, or that expressed in the act: *Com. D. Action on Stat. E.*

*When a Concurrent Remedy with other Actions.]* Case affords a most extensive remedy for all breaches of duty, *ex quasi contractu*; and "where from a given state of facts the law raises an obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case, founded in tort, is the proper form;" *p. Littledale, J., Burnett v. Lynch*, 5 *B. & C.* 609. Where the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent, and the performance of the covenants contained in the lease, and A. took possession and occupied the premises under this assignment, and the lessor, having sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee, it was held that the lessee might maintain an action upon the case, founded in tort, against A., for having neglected to perform the covenants, whereby the lessee sustained damage: *ib.* 589. Case often lies as a concurrent remedy with assumpsit: "It by no means follows that, because a promise may be implied by law, this \*action on the case, which is in [\*338] terms founded on the breach of *that duty from which the law implies a promise*, may not also be maintainable;" *p. Abbott, C. J., ib.* 602. And, in *Govett v. Radnidge*, 3 *East*, 70, *Ld. Ellenb.* observes, "There is no inconvenience in suffering the plt. to allege his gravamen as consisting in a breach of duty, arising out of an employment for hire, and to consider that breach of duty as tortuous negligence, instead of considering the same circumstances as forming a breach of promise, implied from the same consideration of hire." But not only in the case of implied, but in express contracts, if they *create a duty*, case will lie; for, "although there be an express contract, a party is not bound to resort to that contract, but he may declare on the tort, and say that the party has neglected to perform his duty:" *p. Bailey, J. ib.* 605; *Dickson v. Clifton*, 2 *Wils.* 319; *Bretherton v. Wood*, 3 *B. & B.* 54; *Mast v. Goodson*, 3 *Wils.* 348.

*Advantages of the Action in Preference to others.]* By declaring in case the plt. may, in many cases, prevent the deft. from pleading the nonjoinder of other defts., *Bretherton v. Wood*, 6 *Moo.* 141, *s. c.*; and he will not be nonsuited, though he only prove one of several defts. liable: *Ansell v. Waterhouse*, 2 *Chit. Rep.* 1; *Bretherton v. Wood*, 6

*Moo.* 141; 3 *B. & B.* 54; *Govett v. Radnidge*, 3 *East*, 65, 70: see *ante*, "*Abatement*." It will also deprive the deft. of his right of set-off, *Smith v. Hodson*, 4 *T. R.* 211, 2 *H. B.* 135; see tit. "*Set-off*;" or of pleading his certificate, *Parker v. Norton*, 6 *T. R.* 695, *Staniforth v. Fellowes*, 1 *Marsh.* 184; and also avoid the stat. of limitations, in cases of fraud: *Brown v. Howard*, 4 *Moo.* 508: see tit. "*Statute of Limitations*." As case carries full costs, it is preferable to trespass; as, in some cases of assault and battery, and trespass to the land, the plt. is not entitled to full costs, if the damages be under 40s.: *Savignac v. Roome*, 6 *T. R.* 129. And case is sometimes advisable where the owner's property is not clear: *Edmeads v. Newman*, 1 *B. & C.* 418. It is also advisable at times to adopt case for the purpose of joining a count in trover: *Govett v. Radnidge*, 3 *East*, 70.

### *Form of Pleadings.*

Under this head will be considered only those general rules which apply to actions on the case in general; those particular rules of pleading which apply only to particular actions, will be found under the respective titles of such actions throughout the work.

**DECLARATION.]** In actions on the case, the declaration should set forth,—1st, by way of inducement, the circumstances under which the injury was committed; 2d, the injury itself; and, lastly, the consequential damages resulting therefrom to the plt.

*Inducement as to Circumstances under which the Injury was committed.]* The property, or thing injured, should be described with certainty, and in such terms as are commonly used in the law: thus, a way ought not to be described as a passage, *Yelv.* 163; and see 1 *Chit. Pl.* 327. The term "close" is proper in describing land, though the land be not inclosed, as it imports, in law, the interest in the soil: *Doe v. Stud.* 30; *Stammers v. Dixon*, 7 *East*, 207. Animate property may be described as a *chattel*: *Year-book*, 17 *ed.* 3 *pl.* 41. In actions for a tort to personal property, the goods or cattle ought to be described with certainty, stating the number and value, 11 *East*, 576, 578; but as the plt. may recover, if he prove any part of his case, the doctrine as to certainty in the enumeration of the property appears to be of little utility: 1 *Chit. Pl.* 327; *Rep. temp. Hardw.* 121; 2 [\*339] *Saund.* 74, *b.* It is, in general, however, advisable \*to keep as near to the facts as possible in every averment; and in prescriptions the plt. should not state a right to more than is sufficient to sustain the action, 1 *Chit. Pl.* 328, *Bailiff's of Tewkesbury v. Bricknell*, 1 *Taunt.* 142, *Morewood v. Wood*, 4 *T. R.* 160, 1 *B. & P.* 394, 5 *Co.* 78, *b.*, *B. N. P.* 59, 1 *Camp.* 315, *n. a.*; and this should be particularly attended to in an action claiming a right of common or a way: *Brook v. Willett*, 2 *H. Bla.* 234; *Vin, Ab.* tit. "*Prescriptions*," *W. post.* Customs must be proved as laid: *Parkin v. Radcliffe*, 1 *B. & P.* 394. "It is not necessary, when quantity, extent, or value, are brought into issue, that the proof should correspond with the averment," *Step. P.* 318; and the plt. is at liberty to prove any lesser quantity or sum,

and the jury will find *pro tanto*; if, however, they constitute the gist of the action, they should be strictly proved.

*The Plaintiff's Right or Interest in the Thing or Property affected* should be stated according to the facts, to show that the injury by deft. has affected such right or interest; and any material variance would be fatal. Where the law gives a *general* right, as for all persons to pass along a public highway, it is improper to state such public right, or to prescribe; and it will suffice to show that such a particular place was a public highway, and that the deft. prevented the plt. from using it: *Ward v. Creswell, Willes*, 268; *Vin. Ab. Prescription, U; Tenant v. Goldwin, Ld. Raym.* 1091. So, whenever the right of the plt. is *implied by law*, as the absolute rights of persons, it is unnecessary to state the same: see instances, 1 *Chit. Pl.* 328. But, where the law does not imply the right to the matter or thing affected, it must be stated either *generally* or *specially*: *Com. Dig. tit. "Pleader," C. 34*; 1 *Chit. Pl.* 329. In actions for torts to personal property, it must be shown, that the goods, &c. were the plt.'s, either by the words "of the plt.," or that he was "possessed of the goods," &c., or the omission will be fatal, even after verdict, the objection being the want of title, and not a title defectively stated: see the precedents, 1 *Chit. Pl.* 329; 2 *Saund.* 379, n. 13; *Com. Dig. tit. Pleader*, 3 *M.* 9. And, where the plt.'s interest in personal property is reversionary, his right must be described accordingly, 1 *Chit. Pl.* 329; but, if the deft., by his plea, admit the plt.'s property, the defect will be aided: 1 *Sid.* 184. In describing the plt.'s right or interest to *real* property, corporeal or incorporeal, in a personal action against a *wrong-doer* for the recovery of damages, and not the land itself, it is sufficient to state in the declaration, that the plt., at the time of the injury, was possessed of a house or land, &c.; and that, by reason of such possession, he was entitled to the way, or other right, in the exercise of which he had been disturbed: *Com. Dig. Pleader, C. 39*; 2 *Saund.* 113, a. n. 1, 172, n. 1; *Rider v. Smith*, 3 *T. R.* 766; see *Fentiman v. Smith*, 4 *East*, 107, as to when plt. should not state that, "by reason of such possession," &c.: see also, *post*, "*Common, Disturbance of*." In declaring for not grinding at plt.'s mill, it is sufficient to declare generally on the custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll: *Gard v. Collard*, 6 *M. & S.* 69. But, though it is not necessary to lay a title by grant or prescription, &c., yet the title or consideration must be proved on the trial: 2 *Saund.* 114. c.; 4 *Mod.* 421-4; 1 *Saund.* 346, n. 2. When the plt.'s right consists in an obligation on the part of the deft. to observe some *particular duty*, the declaration must state the nature of such duty, and the plt. must prove such duty as laid, and a variance will, as in actions on contracts, be fatal: 1 *Chit. Pl.* 332. When the declaration is for the breach of an express or implied *contract*, and proceeds for non-feasance, the consideration of the contract must be stated, either in terms or in substance, *Else v. Gatward*, 5 *T. R.* 143, *Maz v. Roberts*, 12 *East*, 89; but, where it is for a *misfeasance*, or *malfeasance*, no consideration need be stated, *ib.*; and, when it is founded on the *obligation of law*, \*unconnected with any con- [\*340] tract between the parties, it is sufficient to state very concisely

the circumstances which gave rise to the deft.'s particular duty or liability, as in actions against sheriffs, carriers, innkeepers, &c.: *ib.* 149; 1 *Chit. Pl.* 332.

With respect to what is a fatal variance in the statement of the plt.'s right or interest affected, the general rule is, that, if the whole of an averment or allegation be struck out without destroying the plt.'s right of action, it is not necessary to prove it; but that, if the whole cannot be struck out without getting rid of a part essential to the cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the plt. cannot recover: *Williamson v. Alison*, 2 *East*, 452; 1 *Chit. Pl.* 336. And the other rules, as to what is a variance in actions of assumpsit, will here apply: *ante*, 114.

A distinction is now established between allegations of matter of substance and allegations of matter of description. The former require to be *substantially* proved; the latter must be *literally* proved. That distinction was laid down by the court in *Purcell v. Macnamara*, 9 *East*, 157, and has since been acted upon in the case of *Phillips v. Shaw*, *p. Abbott, C. J.*, 4 *B. & A.* 435; as to the former of which cases, the *C. J.* further said—"There the allegation in the declaration was, that the plt. *had*, on a certain day, *been acquitted*. Now that fact could be proved by the production of the record of acquittal. When that was produced, it appeared *that the acquittal had taken place*, not on the day stated in the declaration. But the court held it sufficient; for the allegation in the declaration being of a *substantial matter*, and not being a description of the *record* of acquittal, was well supported by the proof:" 4 *B. & A.* 435. In *Phillips v. Shaw*, which was for not indemnifying plt. for becoming bail for Pinnock, at the suit of D. Page, it was stated that Page in Mich. term, 58 G. 3, recovered against the plt.; the judgment given in evidence was of Hil. term, and *Abbott, C. J.*, said, "Here the substantial matter is, that, before the present action was brought, a judgment had been recovered by Page; and it was perfectly immaterial at what particular time that judgment was obtained: this is then not a fatal variance; but, if plt. allege a judgment in K. B., and prove it in C. P., he will be nonsuited: *Sheldon v. Whittaker*, *R. & M.* 267; 4 *B. & C.* 657, *s. c.*; and the case of *Stiles v. Rawlins*, 5 *Esp. Rep.* 133, is overruled." And where, in case against the sheriff for escape, it was stated that an attachment of privilege was sued out, viz. by which said writ, &c., &c., to answer the said plts. of a plea, &c., *to the damage of the said plts. of £30, &c.*; but the writ produced omitted the words, "*to the damage of the said plts. of £30, &c.*:" it was held not to be a variance; and *Best, C. J.*, said, "I am of opinion, that the declaration does not profess to describe the writ, but merely to state the substance and effect of what the sheriffs were commanded to do:" *Cousins v. Brown*, *R. & M.* 292: see also the case of *Draper v. Garrat*, 2 *B. & C.* 2; and *Judge v. Morgan*, 13 *East*, 547; 1 *T. R.* 235. Where plt., in case for escape, stated a party arrested on mesne process to have been brought before a judge by virtue of a habeas corpus, by him committed, &c., *as by record thereof now remaining in K. B. more fully appears*; and it appeared that the original writ was merely in the custody of the clerk of the papers of the K. B. Office, where they were always

deposited, the court held, that the allegation was either impertinent, as not being a record, and requiring no such proof; or if it were of *quasi record*, it had been sufficiently proved by the production of the writ, &c.: *Wigley v. Jones*, 5 East, 409. In the case of *Turner v. Eyles*, 3 B. & P. 456, the party had been taken upon a writ of execution, which Lord Ellenb. said might perhaps make a difference.

Allegations of *description* must be literally proved; therefore, where plt. undertakes to describe a third person in his declaration, he must set out \*his name, title, &c. correctly, or he will be non- [341] suited; therefore, where, in case for charging plt. of felony before a justice of the peace, the allegation was, that plt. appeared before Baron Waterpark, of *Waterfork*, and the proof was, that he appeared before Baron Waterpark, of Waterpark, it was said, that the words "of Waterfork," appeared to be part of the description of the title, and not merely referable to the place of residence of Lord Waterpark; so that it became matter of description, and was, therefore a material variance: *Walters v. Mace*, 2 B. & A. 758-9. And, in case against an attorney for negligence, where it was alleged that the said Margaret was arrested, by virtue of a writ of *quo minus*, by the name of Margaret Brown, otherwise Southall, and the writ produced was Suthall, *Ld. Kenyon*, C. J., considered it a fatal variance, *Brown v. Jacobs*, 2 Esp. Rep. C. 726; and where, in setting out a bail-bond, the words "upon promises" were omitted, it was held fatal: *Baker v. Newbegan*, R. & M. C. 93. In case for escape, it was alleged that one S. S. was arrested and gave bail, and afterwards bail above before a judge at chambers; *prout patet*, that S. S. surrendered, and afterwards escaped. *Per Bailey, J.*: "Upon the trial, the plt. produced the entry of recognizance of bail, and the entry of special bail in the filacer's book, to verify this allegation; but the former imported not that the recognizance was taken before me at Sergeant's Inn, but in court at Westminster; and the latter imported that bail was put in before me, but did not state in what place: the question was, whether *this* was evidence to support the averment. There was other evidence, to show that, upon a recognizance taken before a judge at chambers, it was the course of practice to enter it as if it were taken in court. It was not disputed but that this was an essential part of the plt.'s case; for, though the debtor was committed by the C. J., the validity of that commitment depended on the previous allegation, that bail above was put in. Whether this be or be not a recognizance, depends on the question, whether it was made before a competent tribunal. A judge is competent, so is the court; and it is essential to state that it was taken before one or the other. There is a difference in effect between a recognizance taken in court, and one taken before a judge at chambers, for the *scire facias* in the former case must be in the county in which the court sits; in the latter, it may be either in that county, or that county in which it is taken. A recognizance, when entered, is a record, and no extrinsic evidence can be resorted to to prove it. If evidence were allowed to be given by the filacer's book, that bail was put in before the judge at chambers, it would be necessary to go further, and there must be the introduction of new matter, to prove an essential and indispensable fact." It was, therefore, held to be a fatal variance: *Bevon v. Jones*,

4 B. & C. 407. In case against sheriff for negligence in losing replevin-bonds, &c., the declaration stated, that certain goods of a tenant were replevied, who appeared, &c., and levied his plaint against plt., which was afterwards, on 25th March, 1823, duly removed out of the county court of the said sheriff of the county of C., into the court, &c. by *re fa. lo.*: at the trial it appeared, that in December, 1822, when the replevin-bond was taken, the deft. was sheriff of the county of C.; but that, at the time *the plaint was removed; he had ceased to be so.* Per Holroyd, J.: "I am of opinion, there is no variance in this case. It seems to me, that the averment, that the plaint was removed out of the county court of the said sheriff, is not an allegation of description, but of substance. It was matter wholly immaterial who the individual was who presided in that court at the time when the plaint was removed:" 5 B. & C. 296. Case for escape: declaration stated a judgment recovered in K. B., in Easter T. 5 G. 4; that in Trin. T. next *there was an award of execution by the court, and thereupon, on, &c.* in Trin. T. in the fifth year aforesaid, the deft. was committed to, &c. Plt. proved the original judgment in K. B., and the *committitur* thereon, but no judgment in *sci. fa.* It was objected that, to support the allegation of award of [\*342] the execution, \*plt. must prove a *sci. fa.* P. Bailey, J.: "All these allegations have been proved; but deft. has failed in proving, as his allegation imports, that there was any judgment in *sci. fa.* That was of itself an immaterial allegation, because a *sci. fa.* was unnecessary, a year not having elapsed, &c. It has been contended, that the word *thereupon* so connected the judgment in *sci. fa.* with the commitment, as to make it necessary for the plt. to prove the former. I think not: *they seem to me to be introduced to mark the progress of the cause.*" And "they amount to an allegation of fact, and not to a description of the record upon which the commitment took place." "If the damages in the award of execution had been different from those in the judgment, it would have been a fatal variance:" p. Bailey, J. *Bromfield v. Jones*, 4 B. & C. 384.

If the averment is in its nature divisible, though included in one sentence, it will be sufficient if the plt. proves a principal fact, or part only, and that he has been injured in respect of *that part* (but this merely extends to allegations of substance, and not of description, see *supra*); that part or member of the sentence including such principal fact which is essential may be adopted, and that which is useless rejected. Thus, where the declaration stated that the plt. was possessed of *a messuage and 150 acres of land*, &c., and, by reason thereof, was entitled to common of pasture, &c., and the proof was that plt. possessed *land only*, and was entitled to common in respect of it, the court held it not to be a fatal variance; and, p. Abbott, C. J.: "This allegation is divisible, and it may be considered as stating that the plt. was possessed of a house, and also that he was possessed of land, and that, in respect of both or either, he was entitled to the right of common in question:" *Ricketts v. Salway*, 2 B. & A. 364. And where, against sheriff for a false return of *nulla bona* to a *fi. fa.* against the goods of R. S. and J. S., and plt. alleged, although R. S. and J. S. had goods, and only proved that R. S. had goods, it was held not to be a fatal variance; and, p. curiam: "The first

allegation is severable, and not entire; the legal effect of it being that R. S. and J. S., both or either of them, had goods, &c. The allegation in substance is, that there were goods on which the sheriff might have levied, &c.:" *Jones v. Clayton*, 4 M. & S. 349. And, if the premises are described as being in the parish of A. and B., the court will construe it to mean part in the parish of A. and part in B.: 4 Taunt. 671. In slander, proof of part of an inducement that plt. carried on two trades will suffice, provided the words proved apply to him in the one trade proved: *Figgins v. Cogswell*, 3 M. & S. 369; 1 ib. 386. But, where the averment consists of circumstances not divisible, each fact included in the different members of the sentence being equally essential to the cause of action, as where the averment is of an entire thing, the whole must be proved as laid, and no part can be rejected as immaterial, as no allegation sufficient to maintain the action would be left. Therefore, in *Savage v. Smith*, the plt., having described the *fi. fa.* as founded on a particular judgment, and having failed in proving the judgment, was nonsuited; for the *fi. fa.* so described was an entire thing: *p. Chamber, J.*, 3 B. & P. 465. And, in the case of *Edwards v. Lucas*, 5 B. & C. 340, it was said, "The former judgment was an essential part of the plt.'s cause of action: he was bound to set out a judgment warranting the *fi. fa.*" See the case briefly stated, *ante*, 340; see case in 2 Str. 892. Where a party has so connected an immaterial allegation with a material one, it must be proved; because the material part is thus made to depend on the immaterial part. In *Bromfield v. Jones*, 4 B. & C. 383, *Bailey, J.*, cites the following words of *Buller, J.*, in *Peppin v. Solomons*, 5 T. R. 496, in reference to *Savage v. Smith*, (see abstract of this, *supra*, last section): "I admit it was not necessary for the plt. to state the judgment; but, as the plt. alleged that the party recovered a judgment, and that he sued out a writ of execution upon \*the said judgment, the execution was necessarily tied down [\*343] by that judgment, and therefore the judgment was made material by the subsequent words which were introduced. So, in actions for words, where a long introduction is unnecessarily inserted in the declaration, if the charge be tied up to that introduction, the latter must be proved; because the material part is thus made to depend on the immaterial part of the declaration." See the abstract and *dicta* in *Bromfield v. Jones*, *ante*, 341, which is also a strong additional authority on this point. Though the plt. may fail in many particulars, yet if he prove so much of it as leaves him a good cause of action, he shall recover: *Gilb. Ev.* 229; *Rep. tem. Har.* 121; 2 Saund. 74, b., 207, n. 24; *Forty v. Imber*, 6 East, 434. It is in general no objection that a party prescribes for less than he can prescribe for: *Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 143; *Cro. El.* 722. When, by the unnecessary statement of a title, it appears that the plt. has no cause of action, it will be fatal. Thus, in an action against a disturber, in which mere possession is a sufficient title for the plt., yet, if he show a title, and it appear insufficient, the declaration is bad: 1 Saund. 346, a. n. 2; *Com. D. Pleader*, C. 29; 1 Salk. 363.

*Statement of the Injury itself.*] When the act of nonfeasance complained of was not *prima-facie* actionable, it is in general necessary to



state, not only the injury complained of, but also the circumstances under which it was committed: as, that the deft., well knowing the mischievous propensity of his dog, or having been requested to remove a nuisance erected by another, maliciously or fraudulently contriving and intending, &c. (stating a bad intent, corresponding with the wrongful act complained of), committed the act complained of: 1 *Chit. Pl.* 337. If any particular bad intention is necessary to constitute the injury, it must be stated; and, in stating it, the language, as in all other parts of pleading, should correspond with the real or probable facts of the particular case. The usual averment of the deft. well knowing the premises had better be always inserted, in actions where a *scienter* must be proved: see 1 *Chit. Pl.* 338; 7 *Price*, 566. When it is material to show an undue motive or intent, it is seldom necessary, in a civil action, to state it in terms; it is sufficient if it be substantially shown: *Harmun v. Tappenden*, 1 *East*, 563; 1 *Saund.* 242, a. n. 2; 1 *Chit. Pl.* 340.

In the statement of the *injury itself*, it is frequently sufficient to describe it generally, without setting out the particulars of the deft.'s misconduct, especially as the mode of committing such injury must more peculiarly lie in the deft.'s own knowledge, rather than plt.'s: *Winsmore v. Greenbank*, *Willes*, 577; *the King v. Fuller*, 1 *B. & P.* 180; 1 *Chit. Pl.* 341; 3 *Leon*. 13; 1 *Ld. Raym.* 452; 1 *Saund.* 346, a. A declaration stated that deft. struck plt.'s cow divers blows, whereof she died, and, on proof that the deft. had beaten the cow unmercifully, and that plt., to shorten its misery, killed it, it was held no variance, after verdict: *Hancock v. Southal*, 4 *D. & R.* 202. In an action on the case against a master for the negligence of his servant, it has been decided that the negligence may be stated as that of the master, without noticing the servant; but, as the object of pleading is to apprise the opposite party of the facts, it is more correct to state them truly: *Brucker v. Tromont*, 6 *T. R.* 659; *M'Manus v. Crickett*, 1 *East*, 110. If the plt. declare as reversioner for an injury done to his reversionary interest, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion: *Jackson v. Pesked*, 1 *M. & S.* 284. In the statement of different injuries in one count, no inconvenience will result from a failure in proving the whole charge; for, in general, the plt. will, upon proving a part only of the injury charged, be entitled to recover *pro tanto*: *Mailand v. Gouldney*, 2 *East*, 438; *Compagnon v. Martin*, 2 *W. Bl. R.* 790; 5 *Taunt.* 27; 1 *Chit. Pl.*

[\*344] \*341. On the other hand, the cause and manner of committing the injury must be substantially proved, as laid. Thus, evidence of the improper stowing of the deft.'s anchor, by reason of which it broke into another vessel, and thereby damaged the plt.'s goods, will not support a declaration charging the injury to have been occasioned by the unskilful steering of the deft.'s ship: *Hulman v. Bennett*, 5 *Esp. Rep.* 226. And, in case for an injury by fireworks, where it was alleged that the deft., a schoolmaster, *had delivered* and *caused* them to be *delivered* to his scholar, who let them off, and it was proved that they had been delivered to the scholar by another person, without the master's

authority, plt. was non-suited: *King v. Ford*, 1 *Stark*. 421. So, if plt. in case allege that deft.'s dogs were accustomed to bite sheep, he will fail if he only prove that they bit men: *Hartley v. Harnmen*, 1 *B. & A.* 620, *supra*, 2 *Str.* 212, s. c.; and see further, *post*, "Nuisance," "Slander." An averment of the *time* of committing the injury is material; yet the precise time is seldom material, and it may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration: *Co. Lit.* 283, a.; 1 *Saund.* 24, n. 1; 1 *Chit. Pl.* 345; *Purcell v. M'Namara*, 9 *East*, 157; *Woodford v. Ashley*, 11 *East*, 508. Where the injury was capable of being committed on several days, it may be described as having been committed on such a day, and on divers other days and times between that day and the exhibiting of the plt.'s bill; or the commencement of the suit. In such case, the first day should be laid anterior to the first injurious act, because the plt. would not be permitted to give in evidence repeated acts of trespass, unless committed during the time laid in the declaration, though he might recover as to a single trespass anterior to the first day: *Hume v. Oldacre*, 1 *Stark*. 351.

An averment as to the place where the injury was committed is material; yet the *precise* place is only material to be proved in local actions, and where the situation of the land, houses, &c., is particularly described, as in trespass and replevin. In transitory actions, it may be sufficient in general merely to state that the injury was committed in the county at large, though it is advisable to follow the usual course of stating a town or parish in the county; and, though the action is local, yet it is not necessary to give a local description to the nuisance, in an action for diverting the water of a navigation: 1 *Chit. Pl.* 345-6.

[*Statement of Damages.*] In actions for torts, the damages resulting from the injury are frequently, and in some cases necessarily, stated, in addition to the usual conclusion of the declaration, *ad damnum*, &c.: 1 *Chit. Pl.* 346. The general rules as to the statement of damages in assumpsit will, for the most part, here apply: see *ante*, 136. Though plt. prove more damage than stated, he cannot recover, if it be not alleged to such an amount, 1 *Bulst.* 49; but he may enter a *remittitur damna* for the excess, 2 *Arch. P.* 221, 4 *M. & S.* 94; but a miscasting will not preclude the plt.: 1 *Lev.* 58; *Latch.* 175. In actions of tort for special damage, he will not be allowed to go in evidence of any loss or damage beyond what he has expressly alleged in his declaration: *Browning v. Newman*, 1 *Str.* 666; *Bul. N. P.* 7. The loss of substantial benefit arising from the hospitality of friends is a sufficient special damage, if proved: *More v. Meaguer*, 1 *Taunt.* 39. Where a loss of customers is alleged, *they* may be called to prove the fact of not dealing: *Lib. P.* 45. The special damage must also be proved to be the *natural consequence* of the tort; for, if a third person is guilty of an illegal tortuous act to the plt. in consequence of such tort, such third person, and not the deft., is answerable: 8 *East*, 1; 1 *Saund.* 243, a. (5).

[*PLEA.*] In an action on the case, the general issue, "not guilty of the grievances," puts in issue all the averments of the declaration; and, \*whatever will, in equity and conscience, accord- [\*345] ing to the existing circumstances, preclude the plt. from recovering, may be given in evidence by the deft. under this plea; because

the plt. must recover upon the justice and conscience of his case, and that only : 1 *Chit. Pl.* 432. In an action, therefore, on the case, under the plea of not guilty, the deft. may not only put the plt. upon proof of the whole charge contained in the declaration, but may give in evidence any justification or excuse of it, or show a former recovery, release, or satisfaction : 3 *Burr.* 1353. Thus, in an action for a malicious indictment or arrest in a civil action, the deft. may, under the general issue, show that there was sufficient or probable cause for the proceeding complained of : *Cro. E.* 871, 900 ; and see other instances, 1 *Chit. Pl.* 432. In general, when the defence consists of matters of law, though the deft. is at liberty to give the matter in evidence under the general issue, he may plead it specially : 2 *Mod.* 274, 6, 3 *Mod.* 166, *Anon. Com. R.* 273, *Barber v. Dixon*, 1 *Wils.* 44, 175 ; and this is frequently advisable when there is no fact disputed, but only a point of law, which may be decided upon demurrer, or on a writ of error, or where the plt., by his replication, would be compelled to admit one or more material facts in the plea, and would not be at liberty to reply *de injuria*, and consequently the deft.'s proof is rendered less difficult : 2 *Mod.* 277 ; *Vernon v. Goodrich*, 1 *Str.* 5 ; *Jones v. Kitchen*, 1 *B. & P.* 80 ; *Cro. E.* 539. The Statute of Limitations is not guilty within two years, in an action of verbal slander actionable in itself, 1 *Sid.* 95, *Sir W. Jones*, 196, or within six in any other action on the case, 21 *Jac.* 1, c. 16, s. 3 ; as, for crim. con., or debauching a daughter, &c. ; and the statute must be specially pleaded. As to when it is necessary to plead specially in libel or slander, see "*Libel.*"

### • *Precedents.*

See form of præcipe, and declaration thereon, *post*, "*Præcipe.*"

The forms of the commencement and conclusions of declarations in general, and in particular courts, and by and against particular persons, will be found, *post*, "*Declaration.*" They will apply here, adding, after the words, "of a plea," the words "of trespass on the case," but even this is unnecessary : *Plead. Ass.* 292 ; *Lord v. Houston*, 11 *East*, 62.

The forms of special counts in case will be found in the various titles relative to torts throughout the work ; see the notes on *ante*, 338 to 345.

### PLEA OF GENERAL ISSUE, NOT GUILTY.

In the K. B. (or C. P.)

Hilary Term, 8 and 9 Geo. 4.

And the said deft., by his attorney, comes and defends the wrong and injury, when, &c. and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the said plt. hath above thereof complained against him. And of this the said deft. puts himself upon the country, &c.

For other forms of pleas, see the various titles of defences throughout the work, as "*Statute of Limitations*," "*Accord and Satisfaction*." See form of plea confessing causes of action as to part, and general issue as to residue, 3 *Chit. Pl.* 1080, and replication thereto, *ib.* 1186.

### *Evidence for Plaintiff.*

*Under the GENERAL ISSUE.]* Under this plea, the plt. must prove in substance all the material averments in the declaration : viz., the inducement as to the property or thing affected ; the plt.'s right or interest affected ; that his right or interest was such as to entitle him to sue ; the injury committed ; that deft. committed it ; and the damages.

*\*Proof of Inducement as to the Property or Thing affected.]* If any special inducement as to the property or thing [\*346] affected be stated in the declaration, the same, if material to the action, must be substantially proved. A material variance between it and the proof would be fatal: *ante*, 339.

*Proof of Inducement as to Plaintiff's Right or Interest affected.]* If there be any special inducement stated as to this, the same, if material to the action, must be substantially proved. A material variance between it and the proof would be fatal; and, as to what is such variance, see *ante*, 340.

*Proof that the Plaintiff's Right or Interest was such as to entitle him to maintain the Action.]* It must be proved that the plt. had a legal right or interest in the matter or thing affected by the injury, at the time of such injury: *Dawes v. Peck*, 8 T. R. 330; *Benjamin v. Bank of England*, 3 Camp. 417. And persons having a mere equitable interest cannot, in general, sue, except against wrongdoers, when the plt. is in actual possession of the property or thing affected: 1 *Saund. on U. & T.* 222-3; *Jones v. Jones*, 7 T. R. 47; *Allen v. Imlett*, Holt, C. 641. Actions for all torts to the absolute rights of persons, as injuries to health, liberty, reputation, &c., must be in the name of the party immediately injured, as also actions for torts to relative rights: 1 *Chit. Pl.* 49, and cases there collected. A wife, child, or servant, cannot support any action for an injury to the person or property of the husband, parent, or master, as the law invests them with no relative legal rights in such person or property: 3 *Bl. Com.* 143; 1 *Salk.* 119. As to real property, corporeal proof of the plt.'s being in actual possession, whether lawfully or not, will suffice to sustain a verdict, in an action for an injury committed by a stranger, or by any person who cannot establish a better title: *Graham v. Peat*, 1 *East*, 244; *Lambert v. Stroother*, Willes, 221; *Harker v. Birkbeck*, 3 *Burr.* 1563; 2 *Str.* 123; *Cro. Car.* 586; *Philpott v. Holmes*, *Pea. Rep.* 67; 1 *Taunt.* 83, 190-1-4; *Dyson v. Collick*, 5 *B. & A.* 600; *Welsh v. Nash*, 8 *East*, 394. The party, however, must be in the personal or actual possession, or he must have the general property, in respect of which possession immediately follows, or he cannot maintain this action. A mere right to enter is not sufficient: *Dyson v. Collick*, 5 *B. & A.* 600. In case of real property, there is not that constructive possession as in that of personalty; and the party entitled to possession cannot maintain trespass for an injury to such possession, unless he has had actual possession, though he have the freehold in law: *Com. D. Trespass*, B. 3. A person having the immediate reversion, or remainder in fee or in tail, or for a less estate, may support an action on the case for waste, &c., if it be injurious to his reversionary interest: 2 *Saund.* 252, b. The absolute or general owner of personal property, having the right of immediate possession, may in general support an action for an injury thereto, though he have never had the actual possession; it being a rule of law that the property in personal chattels draws to it the possession: 2 *Saund.* 47, a. n. 1; *Gordon v. Harper*, 7 T. R. 12; 1 *Bulst.* 68-9. So, though at the time when the injury was committed the goods were in the actual possession of a servant, carrier, or other bailee, yet, if the

general owner had the right of immediate possession, the action may be in his name, 2 *Saund.* 476, *Gordon v. Harper*, 7 *T. R.* 12; or it may be in the name of the person having the actual possession, but only a special property: 2 *Saund.* 47, *c. d.* But a mere servant, having only the custody of goods, and not responsible, cannot in general sue: *ib.*

An assignee of a chose in action or chattel cannot, in general, sue for an injury thereto, committed before he became such assignee. Thus, an heir cannot maintain an action of waste committed in the time [\*347] of his ancestor; \*nor the grantee of a reversion, for waste committed before the grant, 2 *Saund.* 252, *a*; though a reversioner may, as we have seen, sometimes sue, when the injury is such as to effect the reversion; *ante*, 346. An assignee may, however, always sue for an injury committed after he became such assignee. In some cases, where plt. has assigned his interest in the thing affected, he may still sue in case for a consequential injury. Thus, where the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease, and A. took possession and occupied the premises under this assignment, it was held, lessee might maintain an action upon the case, founded in *tort*, against A., for having neglected to perform the covenants whereby the lessee had been sued by the lessor, and sustained damages: *Barnett v. Lynch*, 5 *B. & C.* 608.

In the case of the death of the injured party, in torts, the general rule is, *actio personalis moritur cum persona*. And this rule seems to apply in all cases, whether the action be founded on personal injuries, or even on contracts, *Kingdon v. Nottle*, 1 *M. & S.* 355, except such as create an injury to the personal estate of the testator; because the executors and administrators are the representatives of the personal property, that is, the debts and goods of the deceased; but not of their wrongs. Therefore, where the damage done to the personal estate can be stated on the record, and increases the individual transmissible personal estate, the action remains to the executor or administrator; *Chamberlain v. Williamson*, 2 *M. & S.* 416. And it is on this principle that case or debt lies by the executor for an escape on final process, 4 *Mod.* 403, 12 *ib.* 71; or against the sheriff, for removing goods in execution, without paying a year's rent due to the testator: *Palgrave v. Windham*, 1 *Str.* 212. But, where the damage consists in previous personal suffering, as in all injuries affecting the life or health of the deceased, all such as arise out of the unskilfulness of medical practitioners, imprisonment of the party, brought on by the negligence of his attorney, through breaches of the implied promise by the persons employed to exhibit a proper portion of skill, &c., or the like are extinguished by death, and the executor or administrator cannot sue, *ib.*, *Sir Wm. Jones*, 174, *Latch*, 168; and the stat. of 4 *Edw.* 3, *c.* 7, has made no alteration in the common law in this respect: 1 *Saund.* 217, *n.* 1.

*Bankruptcy* has the effect of passing to the assignees all rights of action, and every species of rights of which a profit can be made, as such rights are assignable at common law; and questions as to these rights seem to turn much upon the same principle as those which result to executors, &c. But for injuries of a personal nature, which are not the

subject of property, as slander, &c., *Chamberlain v. Williamson*, 2 M. & S. 413, *Benson v. Flower*, Sir W. Jones, 215, ex. p. Charles; 14 East, 197, the bankrupt himself must sue: *Webb v. Fox*, 7 T. R. 391; *Cullen*, 414. So, *insolvency* passes the estate, effects, rights, &c., by § G. 4, c. 119, s. 7, &c., and differs little in its effect, as far as regards the right of suing in case from bankruptcy, except that, by the assignment at the time of the petition, the assignee takes only such property as the insolvent had at the time of the petition: *Hepper v. Marshall*, 2 Bing. 372; *post*, "Insolvent."

When there is a *joint legal* interest existing in two or more persons, who have received a joint damage, they should join in the action: 1 Saund. 291. So, part-owners of a ship or goods ought to join in an action against one who injures or takes them away: *Ohilds v. Sands*, 1 Salk. 32; 4 Mod. 176, 181; 3 Lev. 351. And, where defamatory words are spoken of partners respecting their trade, they may maintain a joint action for the slander; and it is not necessary for them to show the proportion of their respective shares: *Forster v. Lawson*, 3 Bing. 452; *Cooke v. Batchelor*, 3 B. & P. 150; 2 Saund. 117, a. If two persons obtain a mandamus, they may join in an action for a false return to it: 3 Lev. 362-3. So, where bail together employ an attorney to surrender their principal, one cannot \*maintain a separate ac- [\*348] tion for negligence against him; and *Mansfield, C. J.*, said, "The situation of *Hill & Bailey* (the bail) was the same; they were mutually responsible for each other; the act to be done would operate equally in favour of each; the one could not be relieved from his liability without the other:" *Hill v. Tucker*, 1 Taunt. 9; see *Collins v. Barnett*, cited in 3 Bing. 456: see cases where joint payment creates joint interest, *Osborne v. Harper*, 5 East, 225, *Brand v. Boulcott*, 3 B. & P. 235. Tenants in common should also join: *Cro. El.* 554. To constitute a joint legal interest, it must be in the same degree, as tenant and reversioner cannot join for damage to the inheritance, or copyholder and lord, &c. And, where the interest is several, yet plt. ought to join, if the cause of action be an entire joint damage. So, where several persons, called dippers, at Tunbridge Wells, who were chosen by the freeholders of the manor, &c., were disturbed by a person not duly appointed, against whom they joined in an action, it was held they should join; for, although the dippers were severally entitled to receive for their own several use such voluntary gratuities as the company were pleased to give them respectively, they were jointly concerned, as it was a hurt to them all: *Weller v. Baker*, 2 Wils. 423. So, if there be two ancient mills in a manor, at one or the other of which the tenants are bound to grind, the owners of both mills may join against a tenant for not grinding: 2 Saund. 113. And, in *Collins v. Barnett*, it was holden, that two persons might bring a joint action for maliciously holding them to bail, if the complaint in the declaration was confined to the expenses which they were jointly put to in procuring their liberty: p. *Best, C. J.*, cited in *Forster v. Lawson*, 3 Bing. 456. In actions in torts, if a party who ought to join be omitted, it can only be taken advantage of by plea in abatement, *Addison v. Overend*, 6 T. R. 766; and it is not, as in contracts, the cause of nonsuit for nonjoinder; and so it is with tenants in

common: *Cro. El.* 554; *ib.* 770, 554. And, if one or two part-owners of a chattel sue alone for a tort, and the deft. do not plead in abatement, the other part-owner may afterwards sue alone: *Sedgworth v. Overend*, 7 T. R. 279.

In the case of an executor, administrator, heir, or devisee, suing for a tort, see *post*, "*Executor and Administrator*," "*Heir*," "*Devisee*." As to actions by husband and wife, *post*, "*Husband and Wife*."

*Proof of the Injury.*] The injury must be proved to have been committed, as stated in the declaration; and, as to what is a variance, see *ante*, 340. This must, in general, be proved by persons present when the injury was committed, or by deft.'s admissions.

*Proof that the Deft. committed the Injury.*] It must be proved that the deft., or what is tantamount thereto, the deft.'s agent, committed the injury. All natural persons are liable for injuries resulting from their tortious acts, not grounded on, or arising from a contract: 1 *Rab.* 778, 913-4; 1 *Lev.* 169. Therefore, an infant, or *feme coverte*, is liable for her own tortious acts, though, indeed, a *feme coverte* cannot be a tortfeasor, either by prior or subsequent assent, *Co. Lit.* 180-6, n. 4; *Jennings v. Randall*, 8 T. R. 336; and a lunatic is liable in case for any injurious acts committed by him, though he could not be punished *criminaliter*, from the absence of criminal intention: *Bac. Ab. Tres. G. Jar. E. Hob.* 134; *Haycraft v. Creasy*, 2 East, 104.

Corporations are also liable for damages for torts: thus, where a public company lay down pipes so negligently, that an individual, passing along the streets, receives an injury, they are liable: *Matthews v. West London Water Works*, 3 Camp. 403; *Gibson v. Inglis*, 4 ib. 72; *Yarborough v. The Bank of England*, 16 East, 7; *Bush v. Steinman*, 1 B. & P. 405; *Duncan v. Surrey Canal*, 3 Stark. 50; see *post*, tit. "*Corporations*." Judges and justices of the peace, *Bonnell v. Beighton*, 5 T. R. 186, 1 *Ld. Raym.* 466, *Warne* [\*349] \*v. *Varley*, 6 T. R. 449, 3 M. & S. 425; commissioners of bankrupts, *Dodswell v. Impey*, 1 B. & C. 163; the attorney-general, *Johnson v. Sutton*, 1 T. R. 513, 335; or superior naval or military officers, *ib.*, acting within the scope of their authority, are not liable. And, in general, where parties act, *bona-fide*, in the discharge of a public duty, they will not be liable, *Sutton v. Clarke*, 6 Taunt. 29, 2 D. & R. 353, *Bl. R.* 1141, *Bolton v. Crowthor*, 2 B. & C. 703, *Pike v. Carter*, 3 Bing. 85, 2 Bing. 163; but if, as such, they exceed their authority, or act arbitrarily, carelessly, or oppressively, they will be liable: *ib.*, 3 Wils. 461; *Leader v. Moxon*, 2 B. & R. 924; *Thompson v. R. Ex. Assur. Com.*, 16 East, 214; *Jones v. Biril*, 5 B. & A. 837; 3 Bing. 85. So, commissioners of prize-money are liable for not adjudging a prize, &c.: *Chinotti v. Bumstead*, 6 T. R. 646. And a justice of the peace, for refusing an examination on the stat. of hue and cry: 1 *Leon.* 323. And the Bank of England is liable for delay, or other misconduct, as much as a private banker: *Sutton v. Bank of England*, 1 C. & P. 193, 2 Bing. 411, s. c.

If one tenant in common misuse, spoil, destroy, or convert to his own use that which he has in common with another, he is answerable to the other in an action, as for misfeasance: *p. Ld. Kenyon, C. J.: Martyn v.*

*Knowlvs*, 8 T. R. 146. And so with joint-tenants, though they cannot be sued for taking away the chattel: 2 *Saund.* 47, f. g. Owners of a party-wall are liable, the one to the other, for tort: they are not, however, tenants in common: *Matts v. Hawkins*, 5 *Taunt.* 20.

A principal or master is liable for the tortious acts of his servants in all matters done by them in the exercise of the authority that he has given them, whether such servant be immediately retained by himself, or by those whom he has employed; and, however remote the sub-agent may be whose unskilfulness or negligence, &c. was the cause of the injury, the liability may always be traced to the principal, from whom the authority moved: *Bush v. Steinman*, 1 B. & P. 444; 5 B. & C. 547; *Morley v. Graisford*, 2 H. Bla. 442; 3 *Wils.* 317. But the party would not be liable unless the person committing the injury acted at the time as his servant, 1 *East*, 106; and on this point the liability often chiefly depends. And, in *Lougher v. Pointer*, 5 B. & C. 547, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to plt.'s horse, the judges of K. B. were divided as to the liability of the owner of the carriage. In *Sam-mell v. Wright*, 5 *Esp. Rep.* 263, where the horses were hired to go to Windsor, the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, the Marchioness of Bath. In the case of *Sir Henry Houghton*, where he hired horses to draw his carriage travelling post, he was held not to be answerable for accidents produced by the misconduct of the drivers: cited 4 B. & C. 550, and referred to by *Abbott, C. J.*, 575. And, in *Dean v. Branthwaite*, where a dispute arose between the owner of the carriage and the owner of the horses, which he hired, *Ld. Ellenb.* said, "that a person who hires horses under such circumstances has not the entire management and power of them, but that they continue under the power and control of the stable-keeper's servants, who were entrusted with the driving. And, in *Croft v. Alison*, 4 B. & A. 590, where the plts. hired a chariot for the day, appointed the coachman, and furnished the horses, it was held they were correctly described as owners and proprietors. But, if a servant wilfully commit an injury, the master is not liable: 1 *East*, 106. "Therefore, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another, the master is not liable; but, if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being \*an act done in pursuance of the servant's employment:" p. cu- [\*350] *riam*, *Croft v. Alison*, 4 B. & A. 592.

An agent or servant cannot, in general, be sued for any neglect or nonfeasance which he is guilty of, when it is committed on behalf of, and under the express or implied authority of, his master: 12 *Mod.* 488; *Say.* 41; *Wilson v. Peto and others*, 6 *Moo.* 47. Thus, if a coachman lose a parcel, his master alone is liable; so, a servant is not liable for deceit on the sale of goods, or for a false warranty, *Co. D., Case for Deceit*, B. 3 P. W. 379; nor can an action be supported against an at-



torney for a malicious arrest, 1 *Mod.* 209, *Roll. Ab.* 95, *Barker v. Braham*, 3 *Wils.* 379, *Carrol v. Bird*, 2 *Esp. Rep.* 202, unless he exceed the line of his duty: *Crozer v. Pilling*, 4 *B. & C.* 26. And, where under-sheriffs or bailiffs, acting under the express or implied authority of the sheriff, *Taylor v. Riley*, 9 *Price*, 387, *Bowden v. Waithman*, 5 *Moo.* 183, commit a tort, the action should not be against them, but the sheriff: *Cameron v. Reynolds*, *Cowp.* 403; 2 *T. R.* 151; *Sanderson v. Baker*, 2 *W. Bla. R.* 839, 911. And no action is sustainable against an intermediate agent for the negligence, &c., of a sub-agent, but the principal is liable, *Stone v. Cartwright*, 6 *T. R.* 411, *Bush v. Steinman*, 1 *B. & P.* 405, *Cameron v. Reynolds*, *Cowp.* 406, 2 *B. & P.* 438; nor is a person employed to do work for another liable, though the work be so badly done as to injure a third person, *ib.*; but, if he personally interfered and caused the injury, he would be liable: *Wilson v. Peto*, 6 *Moo.* 47; 2 *D. & R.* 93. As to agents of government discharging a public duty, and not acting for their own benefit, they are not liable for the misconduct of such persons as they are obliged to employ; and the doctrine of *respondet superior* does not apply, *Hall v. Smith*, 2 *Bing.* 159, *Nicholson v. Mounsey*, 15 *East*, 384; but the action must be against those persons whose negligence occasioned the injury. Agents, however, are liable who order any thing to be done not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do: 2 *Bing.* 159.

The liability attaching to the owner of animals varies with their particular species. In the case of such as are not naturally inclined to commit mischief, as dogs, horses, and other domestic animals, a previous mischievous propensity must be shown, and the *scienter* clearly established, or that the injury was attributable to that or some other neglect on the part of the owner; and case, and not trespass, is the proper remedy: 12 *Mod.* 333; *Mason v. Keeling*, 1 *Ld. Raym.* 608; *Cro. Car.* 254; 2 *Salk.* 662. With respect to cattle, as their propensity to roam and trespass on other persons' land is notorious, the owner will be answerable, *ib.*, *Rez v. Huggins*, 2 *Ld. Raym.* 1583; but no action lies for damage done by animals *feræ naturæ* escaping from the land of one person to that of another: *Cro. Car.* 387; 1 *Burr.* 259; 5 *Co.* 104, 6; see further, *post*, "*Nuisance*."

In cases where a man is in possession of real property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors, or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be charged, when occasioned by any acts of persons whom he brings upon the premises: *p. Littledale, J., Laughler v. Pointer*, 5 *B. & C.* 560. In *Littledale v. Ld. Lonsdale*, 2 *H. Bla.* 299, and *Stone v. Cartwright*, 6 *T. R.* 411, it was held, that the owner of a mine (and not his agent) is answerable to the person whose property may be injured by the improvident manner of working it, on the principle that "whatever is done for the working of my mine, or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control of all that belongs

to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury \*to another:" *p. Abb- [\*351] bott, C. J.*, 4 *B. & C.* 576. But to the mere ownership of movable property this liability does not attach; as it may be sent out into the world, and conducted by other persons. Actions of this nature should therefore generally be against the tenant or person in possession, *Chietham v. Hampson*, 4 *T. R.* 318, unless the landlord superintended the repairs, &c., *Leslie v. Pounds*, 4 *Taunt.* 649; and, if the landlord erects the nuisance and demises, he is liable, as the demise is a continuation of the nuisance, 2 *Salk.* 460, *Bush v. Steinman*, 1 *B. & P.* 409; or where he covenants to repair: *Payne v. Rogers*, 2 *H. Bla.* 349.

With respect to the *number* of the parties to be sued, and *who may be joined*, where different persons have been jointly concerned in a tortious act, the party injured may bring one action against all jointly, or may sue each in a separate action: *Sutton v. Clarke*, 6 *Taunt.* 34; *Scott v. Godwin*, 1 *B. & P.* 73. And in these injuries, as, for composing and publishing a libel, 2 *Saund.* 117, 2 *Burr.* 985, for not setting out tithe, *Carth.* 361; so, if two persons procure a person to be indicted falsely, *Latch*, 262; so against bailiffs or other officers for a joint tort: *Coup.* 192. All persons liable, as co-proprietors, for the acts of their servants or partners, may be joined, *Moreton v. Hardern*, 4 *B. & C.* 228; as the act of one is the act of all the partners. And, in these cases, the joinder of more persons than were liable constitutes no objection, and one may be acquitted, and a verdict taken against the others, 3 *East*, 62, 1 *M. & S.* 589, but not after judgment: *Tidd*, 711, 903. If the plt. elect to sue one only for a tort committed by several, he cannot plead the nonjoinder of the others, or take any advantage of such nonjoinder: *Sutton v. Clarke*, 6 *Taunt.* 29; 1 *Saund.* 291, *d.*; *Mitchell v. Tarbutt*, 5 *T. R.* 649. But this only applies to the case of torts; for it appears that, if the case be grounded on a particular *contract*, the action will be subject to the same rules of law as if brought in *assumpsit*: *Bretherton v. Wood*, 3 *B. & B.* 62; *Leslie v. Wilson*, *ib.* 171; *Powell v. Layton*, 2 *N. R.* 365; *Max v. Roberts*, 12 *East*, 89, 365; *Govett v. Radnidge*, 3 *East*, 62. See *ante*. A recovery against one of several parties to a joint tort often precludes from proceeding against another party not included in the former action; as, where plt. had recovered against his servant for leaving his service, it was held he could not recover against a person who enticed him away, *Bird v. Randall*, 3 *Burr.* 1345, 1 *W. Bl. R.* 387, *s. c.*; and it is usual to apply to the court to stay the proceedings: *Williams v. Brown*, 2 *B. & P.* 71. But the evidence should be the same, and not on different occasions: *ib.*, *Gregson v. McTaggart*, 1 *Camp.* 415. Where the torts are distinct, a joint action against two or more cannot be maintained, as two persons cannot be separately liable unless they would be jointly liable; *Laugher v. Pointer*, 5 *B. & C.* 559. So, no action lies against several persons for speaking the same words, as the words of one cannot be the words of another: *Palm.* 313; *Cro. J.*, 647; 1 *Bulst.* 15. And, if several persons be joined where the tort could not in point of law be joint, they may demur, and, after verdict, they may move in arrest of judgment, or bring a writ of error, *Barnard v. Gosling*, 1 *N. R.* 245, 2 *Saund.* 117, &c.; but the

plt. may obviate the objection by taking a verdict against one only, or by assessing the damages separately, and entering a *nolle prosequi* before judgment. Where the action is against a tenant in common, joint tenant, or co-parcener, for any thing respecting their land, it should be joint, and it will be bad in abatement: 1 *Saund.* 291, *e.*

Though an *assignee* is not liable for torts before he came to the estate, he will be, in many cases, during his possession, and even after he has assigned his interest; and there is no privity of estate. Therefore, where a lessee by deed-poll assigned his interest in the demised premises to A., subject to the payment of rent, and the performance of the covenants contained in the lease, A. took possession and occupied the premises under this assignment, and, before the expiration of [\*352] the term, assigned to a third \*person, and the lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee; it was held, that the lessee might maintain an action on the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage: *Burnett and others v. Lynch*, 5 B. & C. 589. And, where a tenant for years erects a nuisance, and makes an under-lease to B., an action lies against either: 2 *Salk.* 460. Case, in nature of waste, lies against a tenant for years after the expiration of his term: *Kinlyside v. Thornton*, 2 W. Bl. R. 1111.

The proof for plt., in an action against executors, bankrupts, assignees of bankrupts, insolvents, husband and wife, &c., will be found under those titles.

*Proof of Damages.*] The plt. must, in all cases, be prepared to prove the amount of the damages he has sustained, that they were sustained before action brought, or before the time when the declaration appears to have been filed: 2 *Saund.* 171, *n.* If any have accrued since, if deft. can be procured to consent at the trial to their being taken into consideration by the jury in their verdict, on condition of no action being brought for them, this is desirable. The nature of the proof must depend on the facts stated in the declaration. The statement of the damages being larger than the proof will not prejudice.

*Proof under SPECIAL PLEA or Defence.*] Where an issue is taken on a special plea, and the general issue is also pleaded, the plt. must not only be prepared to prove all that is required of him by the general issue, but also what is required of him in the issue taken on the special plea. When a special plea is pleaded without the general issue, so as to admit all the other facts but what are desired by such special plea, then no proof of such admitted facts need be adduced: and the proof will, in general, then consist of an answer to the special plea, and the amount of the damages. As to special references, see the titles thereof throughout the work.

As to who is to begin to prove the issue, see *ante*, 152.

### *Evidence for Defendant.*

We have already seen under what plea deft. may avail himself of his defence, *ante*, 344-5, and evidence should be adduced accordingly.

*Defences.*] The several defences consist in denying, and, as far as possible, disproving, 1st, the *plt.*'s right to sue, his *legal* right not having been affected, *ante*, 346; or to show that too many persons are *plts.*, *ante*, 347; or that *plt.* is a mere assignee, and has no right to sue, *ante*, 346-7; or that the party who should have sued is dead, *ante*, 347; or that the *plt.* is disabled from suing, as being a bankrupt, insolvent, *ante*, 347, *feme coverte*, &c.: see those titles. 2. That the defendant was not the party who committed the injury, *ante*, 348; or that he was a mere agent, *ante*, 350; or that the real wrong-doer is dead; or that the *deft.* is discharged by bankruptcy, insolvency, or is a *feme coverte*: see those titles. 3. That the action is misconceived, and should not have been in case, *ante*, 336; or that it is brought too soon. 4. That there is a variance between the inducement or injury, &c., and the proof. 5. That *deft.* is discharged by the Statute of Limitations, award and satisfaction, from recovery, &c.: see those and other titles. 6. *Deft.* should be prepared to reduce the damages.



\*CHANCERY, PROCEEDINGS IN.

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*Decree or Judgment in; Effect and Proof of.*] A decree or judgment in this court is admissible in evidence in the same manner as judgment in other courts: *B. N. P.* 243; *post*, "*Judgment.*"

It may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer, *Trowel v. Castle*, 1 *Keb.* 21, *B. N. P.* 244; but it has been held, that the bill and answer need not be proved, if they are recited in the decretal order: *ib.*, *Com. D. Ev. C.* 1. However, the rule generally laid down seems to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic fact (as that the decree was made by the court), he ought regularly to give in evidence the whole proceeding on which the decree is founded. "The whole record," says C. B. Comyn, "which concerns the matter in question, ought to be produced:" *Com. Dig. Ev. A.* 4; 1 *Phil. Ev.* 373.

*Bill in; Effect and Proof of.*] A bill in chancery is only evidence, in the courts of law, to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce in evidence the answer, or the depositions of witnesses: *Ld. Ferrers v. Shirley, Fitzgib.* 196; *B. N. P.* 233. It is not admissible to prove any facts, either alleged or denied, in the bill; therefore, a bill in equity, or depositions, cannot be received in evidence on the trial of an action of ejectment against a party not claiming or deriving in any manner under the *plt.* or *deft.* in equity, either as evidence of the facts therein deposed to, or as declarations respecting pedigree: *Bowerman v. Sybourn*, 7 *T. R.* 2. But *Ld. Kenyon* is reported to have admitted a bill filed by an ancestor to be evidence of a pedigree there stated as a declaration in the family, *Taylor v. Cole*, *ib.* 3, *a.*; and there may be other exceptions to the above general rule, against the admissibility of the bill as evidence.

As to proof of the bill, proof of a decree reciting the bill and answer will suffice: *Com. D. Evid. C. 1*. Evidence of the bill only will be of no avail; the subsequent proceedings also, or the answer, must be proved: *B. N. P. 235*; 1 *Sid. 221*; *Bowerman v. Sybourn*, 7 *T. R. 3*, *supra*.

*Answer in, Effect and Proof of.*] An answer in chancery is evidence as an admission upon oath, *Gillb. Ev. 106*, and is strong evidence against the party making it, but is not evidence against other parties: *Goodright v. Moss, Cowp. 591*. Therefore, if a person makes an admission in his answer which is prejudicial to his estate, it is not evidence against his alienee, *Salk. 286*, unless the plt. himself make it so, by producing it first: *B. N. P. 238*. As, in an issue out of chancery to try the terms of an agreement, which was proved by one witness, but denied by the deft., the witness being dead before the trial, the plt. was under the necessity of producing the bill and answer, in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the deft.: *Bourn v. Sir Thomas Whitmore, Salop, 1747*. The answer of a guardian, though purporting to be that of the minor, is not evidence against the minor. But it was held, that an answer, purporting to be an answer of a minor by a mother and guardian, may be read against the mother in another cause, in which she is defendant in her own capacity: *Beasley v. Magrath, 2 Sch. & Lef. 34*. An answer by one deft. is not evidence against his co-deft., as no one is bound by the acts or declarations of another, without his assent: *Wyck v. Meal, 3 P. Wms. 311*; 12 *Ves. 361*. But an admission, [\*354] by one of two partners concerning the \*partnership liabilities, is good evidence to charge the other partner, in an action against him alone: *Wood v. Braddick, 1 Taunt. 104*; *Grant v. Jackson, Pea. 203*; *Lucas v. De la Cour, 1 M. & S. 250*. The answer of a party is evidence against one who claims under him. Thus, in an action for setting out tithe, copies of a bill and answer in a suit by the vicar for the tithe hay, against J. C., then occupier of the close, and from whom the deft. purchased, denying the vicar's right, and setting up a right in the ancestor of the plt., were held to be evidence against the deft.: *Countess of Dartmouth v. Roberts, 16 East, 334*. It seems doubtful whether the answer of a married woman can be used in evidence against her, in an action after the husband's death, on the ground that, being under the control of the husband, she is not a free agent: *Wrottesley v. Bendish, 3 P. W. 237*.

An answer must be taken entire and unbroken; therefore, the party who reads an answer makes the whole of it evidence, *Bac. Ab. Evid. 622, 5 Mod. 9, 3 Salk. 153*; and, if, upon exceptions taken, a second answer has been put in, the deft. may insist upon having that read, to explain what he swore in the first answer: *B. N. P. 287*. Where the answer charges the deft. by the admission of one fact, and also discharges him by the statement of a distinct and further fact, the rule has been said to be, that what is admitted need not be proved by the plt., but the deft., must make out his fact in discharge: *Bowerman v. Sybourn, 2 Esp. Rep. 499*. Although deft. may insist on having the whole read, that, by comparing the parts with each other, the precise

meaning and extent of admissions may be more correctly ascertained, those parts, however, which he does not state from his own knowledge, but on hearsay, will not be received either in evidence for or against him: *Roe d. Pellatt v. Ferness*, 2 B. & P. 542-8. Where an answer is produced merely for the purpose of showing the incompetency of a witness, who has, in his answer, admitted himself interested in the event of the cause, that part only is to be read which states the ground of interest, *Spavin v. Drax*, B. N. P. 238; for, if the witness be incompetent, his evidence ought not to be received in any form: on the other hand, if he is competent, he ought to be examined, *viva voce*, in open court: *Phil. Ev.* 342.

As to the *proof* of the answer, it cannot be regularly given in evidence without proof of the bill; for, without the bill, there does not appear to be a cause depending; but, if there be proof by the proper officer that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read, without a sight of the bill: *Gilb. Ev.* 49. As the defence in chancery is upon oath, it will be presumed, in ordinary cases, that the answer was sworn to by the deft.: *Phil. Ev.* 373. An answer offered in evidence, merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree or of the party's handwriting: *Lady Dartmouth v. Roberts*, 16 East, 334. Where a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in chancery, it was held that an examined copy in that answer was admissible to contradict him: *Ewer v. Ambrose*, 4 B. & C. 25.

*Depositions in, Effect and Proof of.*] Depositions in chancery, taken by the officers of the court, or taken by commissioners specially appointed for the purpose, may be given in evidence in an action at common law, between the same parties, and on the same matter, provided the deponent is not in a state to give evidence himself; and evidence must be adduced at the trial, to show a sufficient reason for his non-appearance: as, that he is dead, *Fry v. Wood*, 1 Atk. 445, *Benon v. Olive*, 2 Str. 920; or that he cannot be found, after diligent search, *ib.*; or that he is unable to attend, though subpoenaed; *Luttrell v. Reynel*, 1 Mod. 283, 2 Ld. Raym. 1166; or that he is absent from the country, or not within the process of the court, 1 Atk. 445; or that he is kept away by the absence of the other party: B. N. P. 243. And, [\*355] where the witness had actually sailed on a voyage, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds, *Fonsick v. Agar*, 6 Esp. Rep. 92; but it is not sufficient that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance: *Falconer v. Hanson*, 1 Camp. 172. But, when taken on interrogatories under a commission, they are not evidence, without production of the commission, unless the depositions are of long standing: *Bayley v. Wyllie*, 6 Esp. Rep. 85.

Depositions cannot generally be admitted, without proof of the whole record, bill, and answer, &c.; for, as they are, in general, evidence upon the same points between the same parties, or those who claim under

them, it must appear that there is a cause depending, and also be shown who were the parties to the suit, and what are the points in issue, as depositions: *Hard. 472, Gilb. Ev. 55*. Where the Court of Chancery, on directing a trial at law, makes an order that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in evidence which is not strictly admissible in courts of common law, 15 *Ves.* 176; but it must be shown that the witnesses are unable to attend, and the court of law will read them, being under such order, without going through the regular and strict course, by proving the whole record, bill, answer, &c.: *Palmer v. Ld. Aylesbury*, 15 *Ves.* 176; 1 *V. & B.* 340. See further, *post*, "*Depositions*."

*Identity of Parties.*] Some proof of the identity of the parties should be given: a witness who can prove the signature of the deft. to the original answer, will be sufficient, though it be produced in court: *Dartnall v. Howard*, 1 *R. & M.* 169. And it is *prima facie* sufficient, if the name and description at law agree with the name and description of the party answering in equity: *Hennell v. Lyon*, 1 *B. & A.* 182.



## CHARACTER.

**MORAL CHARACTER of Parties to Suit, when Evidence as to is Admissible, 355.—Of Third Persons, as Witnesses, &c. when Evidence as to is Admissible, 356.**

**OFFICIAL OR SPECIAL CHARACTER, as Public Officers, Executors, &c., how proved, 356.**

**MORAL CHARACTER of Parties to Suit, when Evidence as to is Admissible.]** It is, in general, only when the character of a party to the suit is directly in issue, that evidence in support of it is admissible. In an action for slander, imputing felony to the plt., to which deft. pleaded in justification of the slander, averring that the charge of felony was true, it was held that evidence of general good character was not admissible for the plt.; *Abbott, C. J.*, observing, "That, if such evidence was to be admitted on the part of the plt., then the deft. must be allowed to go into evidence to prove that the plt. was a man of bad character. It made no difference whatever as to the admissibility of such evidence, that there was a special justification." *Cornwall v. Richardson*, *R. & M.* 305; but see *King v. Waring*, 5 *Esp. Rep.* 13. And so, in an ejectment by an heir at law, to set aside a will for fraud [356] and imposition committed by the deft., he \*will not be permitted to call witnesses to prove his general good character: *Faro v. Hicks*, *Bull. N. P.* 296; and see 2 *B. & P.* 532, where, in the cross-examination of a witness, he was questioned as to the plt.'s being a person of dissipated character, and, on its being denied by the witness, other evidence was attempted to be adduced to show the general good character of the plt., *Ld. Kenyon* refused to admit it; observing, "That though the

cross-examination of the plt.'s witnesses had been directed to impeach the character and conduct of the plt., he did not think that that authorized him to break through the rule of evidence, by going into evidence of character, as that character stood unimpeached by the testimony of the witness examined, who had denied the imputation intended to be conveyed." *King v. Francis*, 3 *Esp.* 116.

In mitigation of damages, evidence has been permitted on the part of the deft. to show the bad character of the plt. ; as, in an action of slander, evidence was held to be admissible that the plt. was generally suspected of the crime imputed to him, ——— v. *Moor*, 1 *M. & S.* 284 ; "and certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished ; and it is competent to show that by evidence : " p. *Ld. Ellenb.*, *ib.* ; and see *Earl of Leicester v. Waller*, 2 *Camp.* 251. In actions for crim. con. with plt.'s wife, evidence of her having eloped with other men, or that the husband had turned her out of doors, and refused to maintain her, and that he kept company with other women, or that he was acquainted with and consented to the deft.'s familiarities with her, is proper in mitigation of damages : *Bull. N. P.* 27 ; *Bromley v. Wallace*, 4 *Esp. Rep.* 237 ; *Wyndham v. Wycombe*, *ib.* 16 ; *Duberley v. Ganning*, 4 *T. R.* 651, *post.* But, according to the late case of *Jones v. Stevens*, 11 *Price*, 325, this doctrine is not only doubtful, but positively denied to be correct ; and it was there decided, that general evidence of bad character will not be allowed, even in mitigation of damages. In an action for malicious prosecution, deft. gave in evidence probable cause ; in addition to which, he proposed to show the notorious bad character of the plt. ; and *Ld. Kenyon* held, "That the question might be put in a general way, whether the plt. was not a man of bad character ; but particular instances could not be asked by deft.'s counsel, though they might by the plt.'s : *Rodriguez v. Tadmire*, 2 *Esp. Rep.* 721. In a case of seduction of plt.'s daughter, it was proved by deft. that, previously to her acquaintance with him, she had had a child by another man : *Ld. Ellenb.* held, evidence of general good character was still inadmissible, but that plt. was restricted to disproving the specific breach of chastity alleged on the part of the deft. : 1 *Cowp.* 456. And, in an action for crim. con. or seduction, evidence of general good character cannot be adduced until it be impeached by the opposite party : *Bamfield v. Massey*, 1 *Camp.* 460 ; *Dodd v. Norris*, 3 *Camp.* 519.

*Moral Character of Third Persons, or Witnesses, &c.*] The character of third persons is frequently admissible, as affording a presumption with respect to a disputed fact : 2 *Stark. Ev.* 368. But evidence to support the character of a witness is not admissible, unless fraud is expressly imputed to him : *Bishop of Durham v. Beaumont*, 1 *Camp.* 207. And evidence of the conduct of deceased witnesses has been admitted to attach credit to their testimony, or to destroy its effect : *Wright v. Littler*, 3 *Burr.* 1245. And, in the case of attesting witnesses, evidence is admissible for the purpose of showing what credit could be attached to their attestation when alive : *Stevenson v. Walker*, 3 *Esp. Rep.* 284, 4 *Esp. Rep.* 50, 1 *Camp.* 207 ; and so, in a question of illegitimacy, after probable evidence of non-access, proof will be al-



lowed that the mother was a woman of ill fame : *Pendrell v. Pendrell*, *Str.* 925 ; *Salk.* 120.

\*OFFICIAL or SPECIAL CHARACTER, as *Public Officers*, [*\*357*] *Executors, &c. how proved.*] The official character of public persons is sufficiently established in evidence by proof of their acting in those capacities, as in the case of peace-officers, justices of the peace, and constables : *Berryman v. Wise*, 4 *T. R.* 366 ; *Gordon's case*, *Leach*, 581 ; *Rex v. Shelley, Leach*, 381, *n.* In an action by a physician for slander, where, in the declaration, he averred that he was a physician, and had regularly taken his degree, strict proof of his having done so will be required ; as, by the books of the university, or the production of his diploma : *Rex v. Verelst*, 3 *Camp.* 432. But mere proof of his acting as such will substantiate a general averment that he is a physician : *Moises v. Thornton*, 8 *T. R.* 303 ; *sed vide Pickford v. Gutch*, 2 *Stark. Ev.* 373, *n.* ; *Smith v. Taylor*, 1 *N. R.* 196. An allegation of *plt.'s* being an attorney of the court is evidenced by proof of his acting as such : *Berryman v. Wise*, 4 *T. R.* 366 ; *ante*, "*Attorney*," 165. Where a party assumes to act in a particular character, or represents himself as holding a certain situation, it is an admission against him, and no further proof is deemed requisite, see *ante*, 49 ; as, where, in an action against an incumbent, proof of his receiving tithes, serving the church, and acting in every way as the parson, is sufficient, without proof of admission, institution, and induction : *Bevan v. Williams*, 3 *T. R.* 635, *n.* As to proof of party being an assignee of a bankrupt, &c., executor, married, partner, &c., see "*Bankrupt*," "*Executors*," "*Husband and Wife*," "*Partner*."



## CHARTER.

*Effect of, and how proved.*] Where any obscurity exists in the language of an ancient charter, or where the construction may be doubtful, parol evidence of the constant and immemorial usage under the instrument may be adduced, for the purpose of explanation, 2 *Phil. Ev.* 522, and cases cited, *Chad v. Tilsed*, 2 *B. & B.* 406, *Rex v. Varlo, Coup.* 248 ; but in no case will it be admitted with a view of contradicting or annulling the clear words of a charter, *ib.* ; in which case, *Ld. Mansfield* said, "Suppose the words of a charter are doubtful, the usage is of great force ; not that usage can overturn the clear words of a charter, but, if they are doubtful, the usage under the charter will tend to explain the meaning of them." *Blankley v. Winstanley*, 3 *T. R.* 279. As, where, by the terms of a charter, the mayor and commonalty were invested with the power of electing aldermen, evidence of usage was admitted to show that aldermen were included in the term commonalty, *Rex v. Osborn*, 4 *East*, 327 ; or to show that a presentation given by charter to the mayor, aldermen, and burgesses, was properly executed by the mayor and aldermen alone : *Gape v. Handley*, 3 *T. R.* 288, *n.* And usage will be admitted to prove that the justices of a county and those of a borough have concurrent jurisdictions, *Blankley v. Winstanley*, 3 *T.*

*R. 279*; or to show that an appointment by the minister and a majority of the churchwardens was good, when the power of such appointment was merely vested in the minister and churchwardens, *Withnell v. Gartham*, 6 *T. R.* 388; where *Ld. Kenyon* said, "Neither is there any difference in this respect between private deeds and the king's charter; in both cases, evidence of usage may be given to expound them:" *ib. Stammers v. Dixon*, 7 *East*, 200. Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend; otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; and proof of a usage of 300 years' continuance was held unavailable to show that the attendance of a majority of the definite body was not requisite: *Rex* [\*358] *v. Miller*, 6 *T. R.* 268; *Rex v. Bellringer*, 4 *ib.*, 810. "Charters and grants from the crown may be presumed from great length of possession, not only in suits between private parties, but, in some cases, against the crown itself, if the crown were capable of making the grant: *Rex v. Brown, Cowp.* 110, *Phil. Ev.* 149. A charter will not be allowed in evidence to vary the constitution of a corporate body, as settled by act of Parliament: *Rex v. Miller*, 6 *T. R.* 268; *Rex v. Amery, Selw. N. P.* 1139. "While a corporation exists capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it: *p. Ld. Kenyon, Rex v. Pasmore*, 3 *T. R.* 240. So, when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the crown may grant a new charter: *ib.* 199. Where a new charter was granted upon the surrender of the old one, and no enrolment of the old charter was effected, the new charter was deemed void; as, till the enrolling the surrender of the one, both would appear to exist at the same time: *Rex v. Osbourne*, 4 *East*, 335; *Piper v. Dennis*, 12 *Mod.* 253. "Where a corporation takes its rise from the king's charter, the king, by granting, and the corporation by accepting, another charter, may alter it; because it is done with the consent of all parties who are competent to consent to the alteration:" *p. Ld. Kenyon, Rex v. Miller*, 6 *T. R.* 277.



## CHARTER-PARTY.

FROM OF REMEDY ON, 358.—*Parties to Suit*, 359.

FORM OF PLEADINGS IN, 359.—*Declaration, ib.*—*Plea*, 360.

PRECEDENTS, 360.

EVIDENCE FOR PLAINTIFF, 361.

EVIDENCE FOR DEFENDANT, 362.

*Form of Remedy on.*

IF the charter-party be not under seal, the form of remedy for any breach of any promise contained in the same, either in the non-payment of freight or otherwise, is by action of assumpsit, or sometimes debt: see *Str.* 1089. If the charter-party be under seal, covenant or debt is the proper remedy; and on a covenant to pay freight to the master of the ship, the owners cannot sue in assumpsit, and the master must sue in debt or covenant for such freight: *Schack v. Anthony*, 1 *M. & S.* 573; *Bell v. Kymer*, 3 *Camp.* 549, *n. a.*; *Atty v. Parish*, 1 *N. R.* 104. But debt lies only on the deed, if the sum demanded is ascertained thereby, or it sufficiently appears how much is due: *Andr.* 156; 2 *Str.* 1089, *s. c.* And so, if there be a charter-party between the master and freighter, assumpsit will not lie on the implied undertaking of the owners, that the goods would be safely and securely carried: *Colvin v. Newberry*, 6 *Moo.* 425, *n.*; and see *Atkinson v. Cottisworth*, 3 *B. & C.* 647. Where the owner and freighter covenant by deed that forty days shall be allowed for loading and unloading, the freighter impliedly covenants not to detain the ship longer than that time; and, if he do, the owner's remedy is upon the deed, and not in assumpsit, as upon the implied contract: *Randall v. Lynch*, 12 *East*, 179; *Bessy v. Evans*, 4 *Camp.* 131; 2 *Chit. Rep.* 500. So, if the owner execute a deed to the merchant, containing the usual covenant for a right delivery of the cargo, he cannot be sued by the merchant for not delivering it; [\*359] in an action on the case or assumpsit, grounded on \*the bill of lading signed by the master: *Hunter v. Princess*, 10 *East*, 378. But it would be otherwise if the owners were not charged directly on the contract of charter-party, but upon their general liability. Where a charter-party under seal was made by the master in that character with merchants, who did not know that he was also a part-owner in the ship, as in fact he was, it was held that they might sue him and the other owners, in an action on the case for a breach of such general duties as were not inconsistent with the stipulations of the charter-party; such as the not providing necessities for the voyage, and employing a negligent and unskilful master: *Leslie v. Wilson*, 3 *B. & B.* 171, *s. c.*; 6 *Moo.* 415. So, an action may be maintained on a parol contract, notwithstanding a sealed charter-party, if such contract be distinct in its provisions, and not inconsistent with the deed: *White v. Parkin*, 12 *East*, 578. It is usual for the parties to charter-parties to bind themselves to each other in a penal sum for the performance of their respective stipulations; but this does not preclude the party from bringing his action on any of the other clauses; and he may recover damages beyond the amount of the penalty: *Harrison v. Wright*, 13 *East*, 343; *Winter v. Trimmer*, 1 *W. Bl. R.* 395; *ante*, 149, 150.

Whether the charter-party be under seal or not, an action founded on it must be in the name of the party to it, and not in the name of another, to whom he may have assigned his interest: *ante*, 144. Therefore, the purchaser of a ship previously chartered cannot sue for the freight carried under the charty-party in his own name, *Splidt v. Bowles*, 10 *East*, 279, although the owner become a bankrupt, *ib.*;

although payment to him will be a good discharge to an action brought in the name of the seller, at least if the purchase be made before the ship sails on the voyage: *Morrison v. Parsons*, 2 Taunt. 407; *Pinder v. Willes*, 1 Marsh. 248. Where goods were shipped in pursuance of a charter-party made by the master with P., and whereby he engaged to receive a cargo from the agents or assignees of P., and deliver the same to him or his assignees, and, upon the shipment, he signed a bill of lading, stating the goods to have been shipped by one S., by order of R. and M., to be delivered to the order of M., and freight to be paid according to the tenor of the contract of affreightment, it was held that M. could not maintain an action against the master for the negligence in stowing the cargo: *Moore v. Hopper*, 2 N. R. 411. If a charter-party is expressed to be made between certain parties, as between A. and B., owners of a ship, whereof C. is master, of the one part, and D. and E. of the other part, and purports to contain covenants with C., nevertheless C. cannot bring an action in his name on the covenants expressed to be made with him, nor give a release of them, even though he seals and delivers the instrument: *Scudamore v. Vaudenstene*, 2 Inst. 673. But, if the charter-party is not so expressed to be made between the parties, it would be otherwise: *Cooker v. Child*, 2 Lev. 74. The execution of the charter-party by the master, although said to be done on behalf of the owners, does not furnish a direct action, founded upon the instrument itself, against them, though it does against the master himself: see *Wilkes v. Bache*, 2 East, 142; 7 T. R. 207; *Abbott on Ship*. 164. All the persons by whom the contract of charter-party is made, and who are jointly interested in it, or the damages to be recovered for its non-performance, must be joined in the action; for otherwise the plt. may be nonsuited at the trial: *ante*, 143. So, all the parties who are joint contractors, and jointly liable to be sued on the contract, must be made co-defts., or deft. may plead the nonjoinder in abatement: *ante*, 14.

### *Form of Pleadings.*

*Declaration.*] Where the declaration is in assumpsit on the charter-party, it usually commences by setting out the whole charter-party, and the parties to it. Care must be taken that there be [\*360] no variance. With respect to the date, if the plt. declare upon a deed as dated on a particular day, it shall always be intended it was delivered at that time, and no other; and if, in pleading, he afterwards state or confess it to have been delivered at any other time, it is a departure from the declaration. Where the plt. declared upon an agreement in a charter-party, dated the 9th of October, to pay for the corn which then was or afterwards should be laden on board the ship, and alleged that, upon the said 9th of October, the ship was laden with sixty lasts of corn, for which the deft. had not paid, the deft. pleaded that the deed was sealed and delivered the 28th of October, and that there was not any corn then or afterwards laden on board, with a traverse of the delivery, on the 9th of October, or at any time afterwards before the 28th; and, on demurrer, the plea was holden good, the word *then* being referable to the time when the deed takes effect by delivery, and not to

the date: *Oshey v. Hicks*, *Cro. J.* 263; see 3 *Lev.* 348. After the statement of the charter-party, the plt. must aver the performance of every act which constituted a *condition precedent*; and, as to what constitutes such condition, see 3 *Chit. C. L.* 391, *Abbott*; *Card v. Hope*, 2 *B. & C.* 564; *Ripley v. Scaife*, 5 *B. & C.* 167. If the performance of such condition be rendered impossible by deft.'s act, or by some other lawful excuse, the same should be stated: *ante*, 127, 9. After the statement of the performance of, or excuse for performance of, the conditions precedent, the breach is stated. As to declaring for a penalty, see *ante*, 136. If it be requisite, different counts should be added to meet the doubtful point. The observations as to a declaration in *assumpsit*, in general, will apply to the necessity and mode of making the above averments: see *ante*, 111 to 136. The *common indebitatus* counts will sometimes be useful; see "*Freight*," "*Demurrage*," &c.

In an action to recover freight or demurrage, or other thing claimed in pursuance of a charter-party by *deed*, the declaration must be specially framed on the deed itself: *Atty v. Parish*, 1 *N. R.* 104; *sed quære* of this decision, as to an action brought by and against the parties to the deed, whether the declaration may not be framed in debt generally, and the deed given in evidence on a demand for freight or demurrage: see *Abbott on Ship.* 164, *n. d.*; *Tilson v. Warwick Gas-Light Co.*, 4 *B. & C.* 968. As to the statement of the date of the deed, *supra*. As to the mode of declaring in debt or covenant in general, see *post*, "*Covenant*," "*Debt*."

*Plea.*] The rules as to the plea are the same as in other cases. See "*Assumpsit*," "*Debt*," "*Covenant*," and the various titles of defence throughout the work.

Where the deft. relies on a discharge from his covenant, he must plead it specially, unless the form of action be *assumpsit*, in which case he may give the fact in evidence under the general issue: see *Cro. Car.* 383. Where the covenants in a charter-party are mutual and reciprocal, the breach of one covenant cannot be pleaded in bar to an action upon another: *Cole v. Shallet*, 3 *Lev.* 41; *T. Jones*, 416. But a contrary rule holds where the cause of action is nullified by the non-performance of the act disclosed by the deft.'s plea: *Sty.* 186. A plea to an action on a charter-party, alleging a custom which would enure as a bar to the action, is, however, bad: *Gibbon v. Yony*, 8 *Taunt.* 254.

### Precedents.

The forms of declarations on charter-parties varying so much, on account of the breach complained of, and being of such length, none are here given. See form of declaration in *assumpsit* on, by owner against freighter, "for not loading, and for demurrage, 2 *Chit. Pl.* 221; debt on, for penalty for not loading cargo, and for freight, *ib.*, 426; covenant on, for freighting demurrage, *ib.*, 528; covenant on for not loading in time, and not paying pilotage, *ib.*, 531; covenant on, by freighter against owner, with special damage: *ib.*, 533.

See several forms of pleas, and in debt and covenant, denying the breaches, and pleading non-performance of a condition precedent.

### Evidence for Plaintiff.

The evidence to be adduced must necessarily depend upon the issue

taken by the pleadings. In assumpsit, all the material averments in the declaration must be proved, under the plea of the general issue. In debt on covenant on a charter-party by deed, only those expressly put in issue by the pleadings need be proved.

Evidence cannot be adduced to control or vary the particular covenants in a charter-party. Therefore, where the ship was chartered to wait for convoy at Portsmouth, *Lord Kenyon* would not suffer a parol agreement to be set up on the other side, to substitute Corunna for Portsmouth: *Leslie v. La Torre*, cited 12 *East*, 583. And this doctrine was sustained by the court of King's Bench in the case of *White v. Parkins*, 12 *East*, 578, though they held that it did not apply to that particular case. The terms of the charter-party may be explained by usage: *Gibbon v. Yony*, 2 *Moo*. 224, s. c.; 8 *Taunt.* 254.

Proof that the ship was not complete, and prepared with every thing to fulfil the voyage, would render the owners liable on the covenant for seaworthiness, &c.: 2 *Holt, Ship*. 77; *Shields v. Davis*, 6 *Taunt.* 65; *Davidson v. Gwynne*, 12 *East*, 381; *Coggs v. Barnard*, 2 *Ld. Raym.* 909. But, to constitute a breach of seaworthiness, &c., it must be proved the ship was so at the time of her departure, *Eden v. Parkinson*, *Doug.* 732; though, indeed, this would in general be presumed, where the ship became leaky during the course of the voyage, from no particular cause, and especially if it became so very shortly after the commencement of the voyage: *Park*. 333; 2 *Dow*, 233.

In an action for the improper manner of stowing, lading, &c., the cargo, evidence of the usage and custom of the place where it is stowed, laden, &c., is admissible, where there is no express stipulation as to mode of stowage, lading, &c., 2 *Holt*, 86, *Cobban v. Down*, 5 *Esp. Rep.* 41; and, as to the master's and owner's duties in this respect, see 3 *Chit. C.* 393; *Abbott on Ship*. 90. When the course of the ship on the voyage comes in question, and the same is not pointed out by the charter-party, it will be a question for a jury to decide on: *Abbott*, 4 *Camp.* 112. In an action for improper conduct in delivery of the cargo, evidence of the custom and usage of particular places and trades is admissible, in the absence of an express stipulation on the question: *Abbott*, 260; 2 *Esp. Rep.* 603; 4 *T. R.* 260; 5 *T. R.* 397; *Pea. Rep.* 150.

*Damages.*] These must depend on the facts of the case: see "*Damages*," *ante*, 149. Where a jury, in an action on a charter-party, assesses damages generally, the court will not allow interest, though the demand arises for special as well as unliquidated damages: *Martin v. Emmote*, 8 *Taunt.* 530. As to damages where there is a penalty declared on or not, *ante*, 136. As to when the owner is entitled to the whole freight, though there be a deviation and breach of the charter-party, and the merchant is driven to his remedy for damages to cross-action, see 1 *Camp.* 377, 4 *Camp.* 112, 10 *East*, 555, 295, 12 *East*, 381.

#### *Evidence for Defendant.*

[\*362]

The main burden of evidence, as we have seen, lies on the plt., and all deft. will have to do will be to rebut the same, either by the cross-examination of plt.'s witnesses or from fresh evidence adduced by himself.

## COMMON, ACTIONS FOR INJURY TO.

FORM OF REMEDY.—*By the Lord*, 362.—*By the Commoner*, 362-3.

FORM OF PLEADINGS.—*Declaration*, 364 to 367.—*Plea*, 367.

PRECEDENTS.—*Declaration for Disturbance of Common*, 367.

EVIDENCE FOR PLAINTIFF, 369.

EVIDENCE FOR DEFENDANT, 371.

*Form of Remedy.*

*Remedy by the Lord.*] If he be disseised, he may have recourse to the action of ejectment: *Addms, Eject.* 28. The same action lies for the owner of wastes, not being lord of any manor. When the lord is disturbed on his soil, by persons having no colour of right, or has his waste surcharged by his tenants; as, where a man, having no right whatever, to enter on the lord's waste, puts his cattle there; or, where one, having a right, puts in cattle which are not commonable, as hogs, goats, &c.; or strangers come upon the soil, and take away wood; or, where the commoner surcharges, or puts more cattle on the waste than the pasture or herbage will sustain, or than he has a right to place there. For these disturbances the lord may have a writ of *quo jure*, an action of trespass, or a special action on the case: 3 *Bl. Com.* 237. He has also, on some occasions, a remedy by distress, in cases of surcharge, and by writ of admeasurement; and he may maintain an action for any trivial trespass, because of the entry and trespass, *ib.* 9 *Rep.* 113; unlike to the commoner, who can only proceed when his profit is diminished: *ib.* It is not necessary that the owner of the soil should actually be in possession, in order to enable him to maintain an action: *Queen's Col. Oxf. v. Hallett*, 14 *East*, 489. As to the lord's power to distrain, he may take the beasts of a stranger, damage feasant, on his waste in this manner: 3 *Lev.* 41; 1 *Saund.* 346, *n.*; 2 *Saund.* 328. And, where the number of beasts which a commoner may depasture is limited, the lord may distrain a surplusage: 1 *Rol. Ab.* 665. And, in a case of surcharge by a commoner, having a right for beasts *levant* and *couchant*, it was held, that the lord might distrain: *Freem.* 273. If, in making a distress, the lord chose the commoner's, in order to separate them from those of a stranger, which he is about to impound, it has been held, that he shall not be answerable in damages at the suit of the commoner, but he may justify such act in pleading to an action of trespass: 3 *Lev.* 40.

*Remedy by the Commoner for a Disseisin.*] The commoner being seised, is in a situation to proceed against all parties who molest him in the enjoyment of his rights. Where he is ousted from an appendant or appurtenant common, whether of pasture, estovers, &c., his remedies are by an assise of novel disseisin, 5 *Rep.* 25; but this remedy, [\*363] where the \*mischief has occurred within twenty years, is now superseded by an action of ejectment: *Newman v. Holdmyfast*, *Str.* 54. A right of common is also frequently tried through the contrivance of a feigned issue.

For disturbances of common, in the nature of a disseisin, such as overstocking the waste, &c., and if any damage or annoyance whatever take

place upon the land, whereby he loses his common, the commoner may have an assise, *Bridgm.* 10; or he may avail himself of the writ *quod permittat*; or, which is most usual, he may bring his action on the case, and the smallness of the damages constitutes no objection to such action: 2 *East*, 161; *Wooltrych on Commons*, 230. An action of trespass does not, in general, lie by the commoner, because he has no ownership in the soil: 2 *Salk.* 637. If, indeed, the commoner's cattle be taken, on the ground of his having no right of common, then trespass or replevin lies; and that is the more preferable form of remedy, as deft. must justify the right specially.

*Remedy by Commoner for partial Disturbance.*] When the lord erects buildings, fences, or hedges, &c., to the prejudice of the commoner's rights, besides the remedies above spoken of, the commoner may, apply an instant redress, and abate them, overturning every impediment that disturbs his profit: 15 *H.* 7, 10. So, if the lord approve, without leaving sufficient common, the commoner may break down the whole inclosure: 2 *Inst.* 88. And it is generally agreed, that a commoner may abate hedges erected on his common: *Mason v. Caesar*, 2 *Mod.* 65. So that, if the commoner be only abridged of his right, he cannot abate; but, if he be entirely excluded, he may do any act likely to give him access to his common: *p. Ld. Kenyon*, 6 *T. R.* 66. Obstructing a way to the waste is also an injury, for which the commoner may proceed against the lord by assise or action: 11 *H.* 4, 25; *Bro. Com. Pl.* 22. Where the owner of the soil ploughs up waste, an issue or action may be had, but not an action of trespass: 2 *H.* 4, 11. And it seems the commoner may eat the corn wrongfully sown, for the wrong begins first from the terre tenant: *Godb.* 124. However, the commoner cannot fill up trenches or pits, as that would be a meddling with the soil: 5 *Vin. Ab.* 39. If the commoner's right is disturbed by coney, or animals of that description, he may have an assise, or an action upon the case, *Palm.* 319, against the owner of the soil, but he cannot himself remove the nuisance, even though his cattle fall into pits, and are hurt: 2 *Bulst.* 115. The estovers, turves, and other rights which a commoner has appurtenant to his tenement, may be unduly invaded by the lord; and here, as in other cases, an assise will lie for freeholders, and an action on the case for these as well as other commoners: 1 *Brownl.* 231. The last disturbance particularly to be noticed as proceeding from the lord, is surcharging the common with his own beasts, or those of others with his license. It is clear that, on such an occasion, a remedy is open by assise, *F. N. B.* 125; or action, *Sty.* 164.

Where a fellow-commoner disturbs another commoner, an action on the case lies for the consequential injuries; and, where the common is stinted, there is a remedy by distress. In general, if a man be disturbed by another, who has an equal right with himself to the profits of the soil, either by surcharging the waste, taking unreasonable estovers, turves, fish, &c., digging pits and holes in the common, whereby cattle are injured, &c., the party may have immediate recourse to his writ of assise, or his action. But a commoner cannot take estovers which have been cut tortiously by another commoner, any more than he can take those which may have been cut by the lord; and the same rule extends



to other commonable privileges: *Woolrych*, 244. It has been decided, that one surcharge cannot be set off against another, as one tort cannot be so set off; and so, where it appeared in evidence that the [\*364] plaintiff had himself surcharged \*much more than the deft, and he was nonsuited, the court will set aside the nonsuit: *Hobson v. Todd*, 4 T. R. 71. With respect to distresses by commoners on the beasts of other commoners, the general rule is, that they cannot be made: *Wool*. 245.

As to disturbances by *strangers*, the most ample remedies are allowed by law against them. An assise, an action on the case, or a distress, are ready remedies to punish acts of disturbances done by these persons. Thus, if, by their cattle, &c., they eat the common of a freeholder, he may consider it as a disseisin, and bring an assise, 1 *Bowl*. 197, or an action on the case; and a copy-holder may have an action on the case: 1 *Rol. Ab.* 89. Where clay was dug by a stranger, and the grass spoiled, it was holden, by three judges against one, that an action on the case would lie: *Golb.* 343; *Wool*. 249.

### Form of Pleadings.

DECLARATION.] The venue is local. In the declaration in case for injuries from the disturbance of plt.'s common appendant or appurtenant, the plt. must show his right to the profit which he complains to have been abridged, and then state that the deft. interrupted him in the enjoyment of it: *Blythe v. Topham*, 3 *Wils.* 288, p. *De Grey, J.*; *Cro. Car.* 158.

With respect to the inducement stating *plt.'s title*, giving him the right, formerly, the declaration usually stated the plt.'s seisin in fee: see *Lil. Ent.* 62. But it is now held, that it is unnecessary to state in a declaration any title to the common, either by prescription or otherwise; and it is sufficient to allege that the plt. was possessed of certain lands, &c. (as the case may be), and, by reason thereof, 15 *East*, 108; 3 *Taunt.* 24, had a right of common in such a place for his commonable cattle, *levant and couchant* upon his land, and that the deft. disturbed him, whereby the plt. could not enjoy his common in so ample a manner as he ought to have done: 1 *Saund.* 346, n. 2; 2 *Saund.* 113, n. 1; *Com. Dig. tit. Action on case for Disturbance*; see 6 *B. & C.* 703. And it has been held, that a declaration, which alleged a possession by plt. of 100 acres in a common arable field, and that, by reason thereof, he had common pasture for all his commonable cattle, *levant and couchant*, in and upon his said land, with the appurtenants in and over the whole of the said common field, at certain times, was correct: *Cheesman v. Hardham*, 1 *B. & A.* 706. A copyholder may declare on his possession as well as a freeholder: 13 *East*, 8. The usual allegation, "by reason of the possession, &c., is improper, if the right do not depend thereon, 4 *East*, 107, 6 *East*, 438; and, as a title need not be shown, it should seem that these words may be omitted: see 15 *East*, 108. If the plt. undertakes to state his title fully, but does so insufficiently, it will be fatal: 2 *Ld. Raym.* 1230; 3 *Salk.* 363; *Cro. El.* 153. But, in general, a variance in the title, which is set out by way of inducement

only, is immaterial: 16 *East*, 33; 4 *Moo.* 218; *Cro. El.* 336; 3 *Taunt.* 137. As to the statement of title in a plea, *post*.

A common in *gross*, arising from a deed, must be claimed, by setting out the legal effect of that instrument, and making a profert of it in court; for, where the plt. established his right of common by grant, except the bringing in of the indenture, judgment was given against him, because he had omitted to show the foundation of his title: *Farmon v. Hunt*, *Cro. Car.* 271. But, where it is claimed by prescription, the pleading should be, that he, and all his ancestors, whose heir he is, from time whereof, &c., have had common in the place where, &c., for all their cattle, omitting of course the mention of levancy and couchancy, the right not being annexed to land: 1 *Saund.* 346. And it is, of course, necessary, whether it be claimed by grant or prescription, to show for what beasts the right is demanded: *Kielw.* 197; *Wool.* 281.

The declaration for a disturbance of estovers, turbury, fishery, &c., is \*similarly framed with that of an injury to pasture, [\*365] *supra*: the plt. states a right to take so much wood, turf, &c., and then complains that the deft. has carried away his profits, whereby he is injured.

As to the statement of the *nature of the property* which gives him the right, it usually is, that he is possessed of a messuage, and so many acres of land, where he claims common of pasture, or estovers; where he claims turves or fish, of a messuage only, situate in such a parish and county, and generally describes each commonable profit, as appertaining to that which best agrees with its quality, *Wool.* 265, it ought not to be pleaded, that the common is appurtenant to a "farm" only, as that is uncertain: 1 *Ld. Raym.* 726. But it is not always necessary, in pleading, to state the common as appurtenant to land, *eo nomine*; for, if it be laid as appurtenant to a thing, as a messuage, &c., which, in intentment of law, *prima-facie*, comprehends land, it is sufficient: 1 *Saund.* 346, *b.* Plt. should state the nature of the property with exactness, 4 *Mod.* 423; but, in mentioning the land to which the right may attach, the precise number of acres is immaterial: *Palm.* 269; *Cro. Jac.* 629; *Strode v. Begot*, 4 *Mod.* 423. And, where plt. stated he was possessed of a messuage and land, when in fact he was possessed of land only, it was held he might recover, *pro tanto*: 2 *B. & A.* 360. And no more particularity need in general be observed in framing the declaration, than what is requisite to exclude any uncertainty, *Hockley v. Lamb*, 1 *Ld. Raym.* 726, and to avoid a variance, *Ricketts v. Salway*, 2 *B. & A.* 360, 1 *Chit. Rep.* 104, *s. c.*; and the courts will construe all allegations with reference to their meaning as settled in common parlance, unless they contain terms which have a peculiar legal signification.

In describing the *right of common* of pasture, it must be stated that it exists for the *plt.'s* cattle, 1 *Saund.* 546, *c.*, 2 *Show.* 328; an allegation, that the right was for *all* the plt.'s commonable cattle, will be supported in evidence, though proof be adduced that the common was not sufficient to support *all* plt.'s cattle: 2 *Chit. Rep.* 297. If there be any doubt as to the extent of the number of cattle, or right, it is proper to qualify the statement of the right, and the plt. need not show more than what makes for him: 2 *H. Bl.* 294; 2 *Wils.* 263. It should

be stated, that the cattle, &c., are commonable, if the prescription be for such: 2 *Lutw.* 1467. If there be any doubt as to the reality of the cattle entitled to depasture, such only as are known to be so entitled should be averred; though, if the plt. should happen to prove a fuller right, as for more, or a different head of cattle, his declaration will not be vitiated, 5 *Co. R.* 78; the name of case, 2 *H. Bl.* 234; 2 *Wils.* 269; *Cro. E.* 722; *Wool.* 270-1; *aliter* in a plea, *ib.* Also, it should be stated, that the cattle are *levant* and *couchant*, unless the right be for a certain number; 1 *Saund.* 28, *n.* 4, 346, *b. c.*; 2 *Saund.* 327; 2 *Rol. Rep.* 379; *Cro.* 27; 2 *Mod.* 85. A lease to plt.'s testator, for years determinable on the lives of a farm, &c., together with *reasonable common* of pasture, &c., will support an allegation of the right being for "all reasonable cattle, *levant* and *couchant*," &c.: 6 *M. & S.* 47. Care must be taken to state the right to be incident only to the premises in respect of which it is claimable. An averment, that the plt. is entitled to common of pasture for all his cattle, *levant* and *couchant*, upon his land, is well supported by evidence that the plt. was a part-owner with deft. and others of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the numbers being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained on such land during the winter, and though the custom proved was to turn out in proportion to the extent, and not to the produce, of the land in respect of which the right was claimed: 1 *B. & A.* 706. Generally speaking, the prescription should be set out entire; but, if a condition be superadded to the enjoyment of the [\*366] common, an omission to \*set that forth, if such omission does not affect the title, will not vitiate the pleading: *Wool.* 267. Where the plt. prescribed for common generally, and the jury found that he had such a right, on paying a penny by the year, the claim was disallowed, for this payment formed part and parcel of the prescription itself: *Lovelace v. Reignolds*, *Cro. El.* 546, 563; *infra*.

The allegation relating to the *time* for enjoying the common should be accurately stated. If the right of common be only at certain times of the year, it must be so described: 2 *Saund.* 23. Where a prescription was laid for every commoner every year, at all times of the year, and the evidence showed that the sheep of the commoner ought to be folded at night on the lands of the farm giving a right, it was held that the words "all times" must be taken to mean all usual times, and that the folding of the sheep was a condition, or rather a consideration, subsequent to the enjoyment of the right, and that therefore the above prescription was well laid: *Brook v. Willet*, 2 *H. Bla.* 224. As to describing the right from *old St. Thomas's day*, &c., see *post*, *Smith v. Flower*, 3 *Bing.* 401.

The *locus in quo* over which the common is claimed should be accurately described. If the plt. has some land of his own in *locus in quo*, it should be averred that the right was over such *locus*, plt.'s own land therein excepted: see *Willes*, 320; *Vin. Ab. Presumption & Pl.* 23. But this is not absolutely necessary: 1 *B. & A.* 706; 6 *B. & C.* 16. It is necessary to have the number of acres of the common or waste proved: 2 *Lutw.* 1231; 1 *Ld. Raym.* 332; 1 *Saund.* 347.

The usual words concluding the statement of the right, viz., "as to the said messuage, &c., belonging and appertaining," are the usual words descriptive of a right of common: *Lit. Ent.* 62. If the right be not by virtue of prescription, but by grant or demise, they should be omitted: 4 *East*, 107; 6 *East*, 438; 1 *Taunt.* 205; 1 *B. & P.* 371. It is not necessary to allege in express terms whether it be common appendant, appurtenant, or in possession: *Willes*, 319. A common appendant need not be pleaded as by prescription, as appendancy implies a prescription: *Latch*, 88; *Dy.* 299, *a.*; *Co. Lit.* 122, *a.* Thus, it is sufficient to say, that the plt. was seized of such an acre, and had common in the place where, &c. on which account he used his common: 33 *H.* 6, 32; 31 *Ass. Pl.* 23. So, where the plt. declared to have common as appendant to the site of a manor and other lands, and did not prescribe to have it as belonging to the other lands, it was said that a claim for common was good by the title of appendant only, and judgment was given for the plt.: *Carvill v. Holt*, *Palm.* 560. It seems, however, that the more prudent way, in such cases, would be to insert counts for a common appurtenant, lest some unforeseen variation in the prescription should appear in evidence, which might enlarge the claim from the strictness of appendancy to a more general right: In another case it was said, that it appears only from the nature of the common pleaded whether it be appendant or appurtenant: *Willes*, 323; *Wool.* 275.

In describing the *injury* itself, it has been held sufficient for plt. to state the deft.'s injury, with the damage generally, as in the following precedent, whether in an action against a commoner or a stranger: *Atkinson v. Teasdale*, 3 *Wils.* 278; 2 *Bl. R.* 817. But, in actions against the lord of the soil, a particular surcharge, as of so many sheep, &c., must be shown; and it will not be enough to say that plt. could not enjoy his common as he had been accustomed: *Lutw.* 107.

In declarations for disturbances of *common*, by *building* houses or enclosing it, it is usual to insert three counts; one stating the particular injury, the next a continuance of the building or inclosure, and a third for a general obstruction: 2 *Chit. Pl.* 804.

The plt. need not show that, at the time of the injury, he was using the common with cattle: 2 *W. Bl.* 1233. If a grant be made of common \*wherever the grantor's cattle feed, there should be [\*367] an averment that his cattle were feeding in such a place at the time when the plt.'s common was disturbed: — *v. Stringer*, *Cro.* C. 599.

*Damage.*] It is necessary to state that plt. could not enjoy the common in so ample and beneficial a manner, in consequence of the injury, 1 *Saund.* 346, *a.*, 9 *Co.* 113, *a.*, 2 *Bl. R.* 1235; but no evidence of any specific damage need be adduced, the infraction of the right being a sufficient injury: *ib.*, 2 *East*, 154, *post.*

*PLEA, &c.*] The subsequent pleadings to these kinds of actions will be the same as in other actions on the case, &c. See "*Case*," "*Trespass*." The plea of not guilty will, in an action on the case for a disturbance, be sufficient to enable the deft. to give his alleged right of common, or, in general, any defence he pleases, in evidence; but, if the action be by the lord in trespass, the plea should be special, setting forth

deft.'s title, &c., 2 *Ld. Raym.* 1134; and, if the lord avows in replevin, the plt. must plead in bar his right; or, if sued in trespass for some collateral injury to the waste, deft. must set forth at length the special matter of his defence: *Wool.* 294. As to the mode of setting forth such right and defence in general, see *post*, "*Common, defence of Right of*." To trespass deft. may plead, *liberum tenementum*. A license may sometimes be pleaded, as a plea of license by deed from the lord to dig turves, leaving sufficient common for plt.: *Willes*, 621; 1 *Show*, 350; *Cro. Jac.* 574; 2 *Saund.* 320; *Wool.* 299. A release of common may be pleaded; and a continuing license will sometimes operate by way of release: *Wool.* 300, 299. A breach of by-law will sometimes afford a plea: *ib.*

### Precedents.

#### DECLARATION IN CASE FOR DISTURBANCE OF COMMON OF PASTURE APPENDANT.

In the K. B. (or C. P., or Excq.)

Term, Geo. 4.

\_\_\_\_\_ to wit (venue local), A. B. complains of C. D., &c. (*Commencement as usual in case, post*, "*Declaration*," *ante*, "*Case*." ) For that whereas the said plt., before and at the time of the committing the grievance hereinafter next mentioned, to wit, on the, &c., (*day of injury, or about the time*), to wit, at, &c. (*venue*), was, and continually and from thenceforth hitherto hath been, and still is, lawfully possessed of a certain messuage, with the appurtenances, situate and being at, &c., in the county of Y., and also of divers, to wit, 50 acres (a sufficient number, *ante*, 365) of land, with the appurtenances, also situate and being at, &c., in the county of, &c.; and, by reason thereof, for and during all the time aforesaid, hath had, and of right ought to have had, and still of right ought to have, common of pasture in, upon, and throughout all the commonable waste grounds in the manor of H., in the county, &c., for all his commonable cattle, *levant and couchant*, in and upon his said messuage and land, with the appurtenances, every year, at all times of the year, at his free will and pleasure, as belonging and appertaining to his said messuage and land, with the appurtenances, to wit, at, &c., in the county aforesaid. Yet the said deft., well knowing the premises, but contriving, and wrongfully and unjustly intending, to injure, prejudice, and aggrieve, the said plt. in this behalf, and to deprive him of a great part of the profits, benefit, and advantage, of his common of pasture, whilst the said plt. was so possessed of his said messuage and land, with the appurtenances, as aforesaid, and whilst he was so entitled to such common of pasture, as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting the bill of the said plt. against the said deft. in this behalf, to wit, at, &c., aforesaid, in the county aforesaid, wrongfully and unjustly surcharged the said common and waste grounds, and depastured, eat up, and spoiled, the grass, then growing on the same, and more cattle than of the right he ought to have depastured thereon, \*to wit, with 100 horses, 100 mares, 100 geldings, 200 oxen, 200 heifers, 200 cows, 200 calves, 20 bulls, and 500 sheep (*according to the facts, though, indeed, the averment need not be strictly proved*), and kept and continued the same so depastured thereon at each of these times for a long space of time, to wit, from thence respectively until the exhibiting of the bill aforesaid; whereby the said plt. hath during all that time been greatly injured, hindered, and obstructed, in the enjoyment of his said common of pasture there, and could not use the same in so large, ample, and beneficial a manner as he, during all the time, otherwise might have enjoyed the same, but hath lost and been deprived of a great part of the benefit and advantage thereof, to wit, at, &c., aforesaid, in the county aforesaid. And whereas, also, the said plt. before and at the time of committing the grievance hereinafter next mentioned, to wit, on the day and year aforesaid, at, &c., aforesaid, was, and continually from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, situate and being at, &c., aforesaid, in the county aforesaid, and also of divers, to wit, 50 other acres of land, with the appurtenances, also situate and being at, &c., aforesaid, in the county aforesaid, and, by reason thereof, for and during all the time last aforesaid, hath had, and of right ought to have, common of pasture in, upon, and throughout, a certain place, waste, or common, called \_\_\_\_\_, situate in the manor of H. aforesaid, in the county, &c., for all his commonable cattle, *levant and couchant*, in and upon his said last-mentioned messuage and land, with the appurtenances, every year, at all times of the year, at his free will and pleasure, as belonging and apper-

taining to his said last-mentioned message and land, with the appurtenances, to wit, at, &c., in the county aforesaid. Yet the said deft., well knowing the premises, but contriving, &c., the said plt. in this behalf, and to deprive him of a great part of the profits, benefits, and advantages, of his said common of pasture, whilst the said plt. was so possessed of his said last-mentioned message and land, with the appurtenances, as last aforesaid, and whilst he was so entitled to such common of pasture, as aforesaid, to wit, on the day and year aforesaid, and on divers days and times between that day and the day of exhibiting the bill aforesaid, wrongfully and unjustly depastured the said place, waste, or common, and the grass then growing on the same, with divers cattle, to wit, &c. (*as before*), the said deft. then and there not having any right whatever to depasture any such cattle or sheep there, whereby the said plt. hath during all that time been greatly injured, hindered, and obstructed, in the enjoyment of his said common of pasture there, and could not use the same in so large, ample, and beneficial a manner as he, during all that time, might and would otherwise have enjoyed the same, but hath lost and been deprived of a great part of the profits, benefit, and advantage thereof, to wit, at, &c., in the county aforesaid. And whereas, &c. (*This count same as the preceding to the "*, and then as follows: *)* surcharged the said common and waste, and depastured and eat up the grass then growing on the same, with more cattle than of right he ought to have depastured thereon, to wit, with 100 horses, &c. &c., and kept and continued the same so depastured thereon at each of those times for a long space of time, to wit, from thence respectively until the exhibiting the bill aforesaid, whereby the said plt. hath during all that time been greatly injured, &c. (*Same as before to the end.*) (*For depasturing common in another place within the same parish.*) And whereas, also, the said plt., before and at that time of, &c., to wit, on, &c., was, and continually from thenceforth hitherto hath been, and still is, lawfully possessed of a certain other message, and diverse, to wit, five acres of land, adjoining to the same, with the appurtenances, situate and being at T. aforesaid, within the manor aforesaid, in the county aforesaid, and, by reason thereof, for and during all the time last aforesaid, the said plt. hath had, &c., common of pasture (*same as before.*) Yet the said deft., well knowing, &c. &c., surcharged the said common and waste grounds, and depastured, eat up, and spoiled, the grass then growing on the same, with more cattle than of right he ought to have depastured thereon, to wit, with 100 horses, &c. &c., and kept and continued the same so depastured thereon at each of these said times for a long space of time, to wit, \*from thence respectively until the exhibiting of the bill aforesaid, whereby, &c., (*same as before.*) And, whereas, &c. (*same as before to the exhibiting of the bill aforesaid, and then as follows:*) to wit, at, &c., in the county aforesaid, in the soil, to wit, in 100 acres of the soil of the said common and waste grounds, wrongfully and unjustly, with ploughs, spades, and other iron instruments, ploughed, cut, and dug up, the turf and the turves, to wit, 600 cart-loads of turves, then cut and dug up, took, and carried away; whereby the said plt., during all the time last aforesaid, could not have or enjoy his said last-mentioned common of pasture, in the said common and waste grounds, in so large, ample, &c., as he during all the said last-mentioned time, ought to have done, but lost the greatest part thereof, to wit, at the parish of H. aforesaid, in the county aforesaid, to the damage of the said plt. of £500; and therefore he brings his suit, &c. Pledges, &c.

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See other forms of declarations for disturbance of common pasture, 2 *Chit. Pl.* 799; for not suffering fields to lie fallow in rotation, *ib.* 802; by building, &c., *ib.* 804; by enclosing, *ib.*; by digging turves, *ib.* 805; by rabbits, *ib.*; by taking off dung, *ib.*; by putting heaps of dung on, *ib.*; by trespassing with horses, *ib.* 806; for disturbing common of turbary, 806, *Wool*; for disturbing common of estovers, 2 *Chit. Pl.* 807. See form of declaration against the lord, *Herne*, 125, 1 *Saund.* 346, a. For averries and cognizances respecting, see *post*.

### *Evidence for Plaintiff.*

In an action for disturbance of common, the plt. will have to prove, 1st. his title to the right of common, as stated in the declaration; 2d. the right of common; 3d. the disturbance and injury done to such right by deft.; and, lastly, the plt.'s damages.

*Proof Title to the Right.*] The plt.'s title must be proved, as stated in the declaration. But we have already seen that the title need not be proved to the same extent as that stated; it suffices to prove the substance of the issue: *ante*, 364; see the instances. It will suffice to

prove the plt.'s possession of some messuage or land, to which such common belongs, or of a house so entitled, where the claim is for common of turbary, &c.

*Proof of the Right of Common.*] This should be proved as stated; though, indeed, as we have already seen, the substance of the statement need only be proved: see *ante*, 365-6, for instances. Where the plt. claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he never had kept any sheep, it was held that this was evidence of a right for all commonable cattle, to be left to the consideration of a jury: *Manifold v. Pennington*, 4 B. & C. 161. Where common of pasture is claimed in the declaration for cattle *sans nombre*, i. e. levant and couchant, the right must be proved as laid; viz. for as many cattle as can be foddered during the winter on the messuage to which the right belongs; and it is a rule, that every custom on which the right of common depends must be proved. Suppose, for instance (as is the case in some places), it has been the usage that cattle depasturing a certain common should lodge within the hamlet, or parish, or vill, wherein the common is: it must be in evidence that the cattle which the plt. has been in the habit of depasturing have been so levant and couchant within the vill: *Wool*. 326. In case for disturbance of common, it turned out that the plt. was a butcher; that his house had neither land, curtilage, or stable, annexed to it; but that, under his shop-window, there was a [\*370] sheepfold, which would contain four sheep at a time, \*but neither a horse nor a bullock;—it further appeared that plt.'s father had always exercised the right of common, but never without the occupation of some land, and the plt.'s custom was to turn out the sheep he did not kill the preceding day till the morning of the next; no levancy and couchancy being proved, as stated in the declaration, *Ld. Kenyon* nonsuited the plt.: 1st. because there was no land on which the cattle could be *levant* and *couchant*; 2d. because the right was claimed for all cattle; and said, even supposing a good right had been made out for sheep *levant* on the hold above spoken of, still no horse or bullock (and the plt. had claimed a right for such cattle) could be kept there: *Scholes v. Hargreaves*, 5 T. R. 46; *Wool*. 327. Where, however, the claim is for a *certain number*, of course the levancy and couchancy need not be proved, but a right for the defined number: 1 *Ld. Raym.* 726. Still it is not necessary for the plt. to prove his actual user of the common at the time of the deft.'s tort, for the greatness or smallness of the wrong, and not the plt.'s exercise of his right, is the question. On the plea of "not guilty" to an action on the case for injuring the plt.'s common, the plt. proved that he had been accustomed to turn from 100 to 300 sheep on the common; but, because it did not appear that he had turned any on during the year in which the deft. committed the wrong complained of, the verdict, which was for the plt., was submitted to the opinion of the court; and it was objected that he had suffered no damage, but it was holden that he had shown what was material to his action, and that such proof was sufficient: 2 *W. Bl. R.* 1293.

The right is usually proved from the testimony of old inhabitants, who have no interest in the event of the suit, such as supporting or en-

larging their rights by the issue of the verdict: see *post*, 371. Where such witnesses cannot be procured, recourse must be had to other proofs: such as ancient grants, reputation, &c. Where an appendant right is in issue, unless a grant beyond time of legal memory be introduced, there does not seem to be any other method of sustaining a right of this nature, which neither appears from old inhabitants or ancient writings, than by reputation. But it is doubtful whether evidence of reputation is admissible to prove a presumptive right strictly private, *Morewood v. Wood*, 14 *East*, 331, 5 *T. R.* 123, 1 *Esp. Rep.* 324; and some foundation should always be laid for the admission of proof by reputation, as an exercise of the right by plt., &c.: 1 *M. & S.* 679; *Wool*, 320; 14 *East*, 328. The declarations of deceased persons will be received, where there is no controversy on the very point their words are employed to illustrate, *Nichols v. Parker*, 14 *East*, 331; and see further as to evidence by reputation, *post*, "*Hearsay Evidence.*" Where the right claimed is for common appurtenant, ancient parchments and writings, containing grants of commonable rights, are often made available, and they will be received in evidence, if proved to be drawn from a proper custody: *Wool*, 322; 3 *Taunt.* 91; 2 *W. Bla.* 989; *post*, "*Deed.*" Sometimes a new grant will be presumed; as, where an uninterrupted possession for a considerable number of years, fifty for instance, is proved, *Wool*, 323, *Cowlam v. Slack*, 15 *East*, 108; and, unanswered by rebutting evidence, long enjoyment is a strong and substantial proof: *Drury v. Moore*, 1 *Stark.* 102. But, if there be any evidence which savours of encroachment, an exercise of a supposed right of common for 100 years will not confirm it: *Dawson v. Duke of Norfolk*, 1 *Price*, 246; *Hetherington v. Vane*, 4 *B. & A.* 428. Acts done on one part of the common may be given in evidence to show the usage on another part of the same common, even against parties reaping benefits from that other part: *Bryan v. Winwood*, 1 *Taunt.* 208.

*Proof of Disturbance and Injury by Defendant.*] This should be substantially proved as stated: see *ante*, 366. Where the plt. sues the lord of the waste, he must particularly show the surcharge or disturbance \*which he complains of, as of so many supernumerary sheep, &c.; but, where he proceeds against the commoner, he need not: 3 *Wils.* 278; *ante*, 366.

*Proof of Damage.*] Some damage must be proved, see *ante*, 367, however little; the least possible mischief, such as the taking a small quantity of dung, to the value of a farthing, from the common, will be sufficient to prevent a nonsuit: 2 *East*, 154; *ante*, 367.

*Common in Gross.*] The proof of a common in *gross*, when claimed by grant, is by putting in the deed, and then giving evidence of the deft.'s injury to the right of common described in it, or, if by prescription, by calling as many old witnesses as can be found to the long enjoyment which the plt. or his ancestors have had of the profits in question, of which the deed becomes a corroborating auxiliary. Where a common appurtenant is by deed, the same course should be observed.

*Common of Turbary, Estovers, &c.*] In actions for disturbance of *estovers*, *turbary*, *piscary*, &c., the plt. proves his possession of the house to which these rights appertain; he then shows his custom to take



the profits for the purposes of repairing his house, &c., for fuel or for sustenance, and then gives evidence to the deft.'s entry into the waste, and his spoliation of the estovers.

*Evidence for Defendant.*

The evidence for deft. will necessarily consist in rebutting the plt.'s proofs, either from the cross-examination of plt.'s witnesses, or, which is more advisable, by the evidence of his own witnesses. He may show that the common has been enclosed and held in severalty adversely for upwards of twenty years, which bars the entry of the commoner, *Hawke v. Bacon*, 2 *Saund.* 156, *Richards v. Peake*, 2 *B. & C.* 918; or he may show that the common has been used in mistake, *Hetherington v. Vane*, 4 *B. & A.* 428, 1 *Price*, 426; or that he has been licensed by the lord to commit the alleged injury, provided there be a sufficiency of common left for plt., 1 *Saund.* 346, *b.*, *post*; or he may show a release, *ante*.

*Competency of Commoners and Persons claiming the same Right.*

If the issue be on a customary right of common, by the establishment of which the witness would be benefited, the general rule is that he is incompetent; but that, where he gives evidence to establish the private prescriptive right of another, he is competent: *Bent v. Baker*, 3 *ib.* 32. For, as *p. Buller, J.*, "If the issue be on a right of common which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right:" *Walton v. Shelley*, 1 *T. R.* 302. And where, in an action on the case against the deft. for not repairing his fences contiguous to a common on which plt. prescribed for common appurtenant, one of the points in issue was, whether the deft. was liable to repair by reason of his occupation, it was determined that other persons who claimed a right of pasture over the same common were not competent witnesses for the plt.: *Anscomb v. Shore*, 1 *Taunt.* 261. And if, by showing that the deft. had no right, the witness would enlarge his own commonable privilege, his testimony will not be admitted: *Kennet v. Foster*, *Selw. N. P.* Thus, where the corporation of King-  
 [\*372] ton, being \*lords of a manor, had enclosed lands, and the plt., as the lessee, brought an action of trespass, on an issue, whether sufficient common was left, he was not permitted to call freemen of the corporation; as, however small the interest, it was enough to disqualify one of the members from appearing to sustain the plt.'s action: *Burton v. Hinde*, 5 *T. R.* 174. But witness will not be excluded where common is claimed by prescription in right of a particular estate; for, if A. has a prescriptive right of common belonging to his estate, it does not follow that B., who has also an estate in the same manor, has the same right; and the judgment for A. would not be evidence for B.: *p. Buller, J.*, 1 *T. R.* 303. Still, where the witness comes to narrow his own right, he may be received, though he claims under the same title he is about to support. So, if several persons have common exclusively of others on

Dale, and the common of one of these comes in dispute, one of the latter may be called to substantiate the right of the former, because it, in effect, charges himself, by admitting another person to have common with him: 1 *Ld. Raym.* 731. Nor is it a good exception to a witness that he has common because of vicinage in the lands in question; for this is no interest, but only an excuse for a trespass: *Bull. N. P.* 285.



## COMMON, DEFENCE OF RIGHT OF.

NATURE AND FORM OF PLEA, AND SUBSEQUENT PLEADINGS, 372.

PRECEDENTS, 374.

EVIDENCE FOR DEFENDANT, 376.

EVIDENCE FOR PLAINTIFF, 377.

*Nature and Form of Plea, &c.*

*Plea.*] In an action of replevin or trespass to real or personal property, if the defence be founded on a right of common, the same must be pleaded specially, 2 *Wils.* 51, *Yelv.* 104, 3 *Wils.* 126, 291, 1 *Saund.* 25, 346, *Com. D. Piscary*, 6 *T. R.* 748; and the plea must not amount to the general issue: 1 *Sid.* 106; 1 *Keb.* 391, 453; 2 *Mod.* 274. If the deft. would drive the plt. to a new assignment, he should plead *liberum tenementum*, either in himself or another person: *Stevens v. Whistler*, 11 *East*, 51. A freeholder or copyholder, or his tenant, may plead this right, *Com. D. Pleader*, 3 *K.* 24; and see further, as to who is entitled to and may consequently plead it, *Wolv.*

If the deft. claims the right as a freeholder, or through him, he should prescribe for the right, *Com. D. Pleader*, 3 *K.* 24, 1 *Saund.* 348, n. 10; if as a copyholder, he should allege a custom within the manor, either for all copyholders, within the manor, or for the tenant of the deft.'s land in particular; *ib.* Or, where a copyholder claims the common in the soil of a stranger, which is not parcel of the manor, he must prescribe in the name of the lord: viz. that the lord of the manor and his ancestors, and all those whose estate he hath, have immemorially had common, &c., in the *locus in quo*, for themselves and their customary tenants; 1 *Saund.* 349, n. 11; *Com. D. Pleader*, 3 *K.* 24. The commoner must set out his *title* to the right accurately, *Underwood v. Saunders*, 2 *Lev.* 178; and it will not suffice for him to state a mere possessory title, as in a declaration. If a freeholder, or one claiming through him, he ought to show a *seisin in fee* of the land to which he claims his right in himself or others, under which he derives his title: *Cro. Car.* 599; 4 *T. R.* 718; *Hutchinson v. Jackson*, 2 *Lutw.* [\*373] 1324. A freeholder may plead his right in a *que* estate: *Fallet v. Troake*, 2 *Ld. Raym.* 1188. A copyholder should state his estate, but he need not show it in certain, 2 *Taunt.* 320, but only allege that every customary tenant of the premises has had, from time immemorial, the right of common, which he claims on a certain waste-par-

cel of the manor, *supra* : *Davy v. Watts*, 1 *Keb.* 652. Care must be taken not to join irreconcilable interests in such a plea : 2 *Wils.* 258. It is not necessary to aver that the commoner was in possession, as that is implied from the allegation of a *seisin in fee*, until the contrary be shown : *Stott v. Stott*, 16 *East*, 343 ; 4 *M. & S.* 392. An inaccuracy in the words denoting the prescription may be cured by the verdict : 3 *T. R.* 147. The various customs of particular manors must be attended to in framing this plea : therefore, in putting out cattle on a common of vicinage, it is indispensable to state the mutual rambling of the cattle, from immemorial usage, and such other facts as may be necessary to establish a mutual privilege of intercommoning : *Gullet v. Lopes*, 13 *East*, 348.

The *right* itself should be stated specifically, and with certainty : 1 *Ld. Raym.* 645. The name of the manor wherein the waste is, should be stated, but the omission is cured by 16 and 17 *Car.* 2, c. 8 ; 5 *T. R.* 412, n. The nature of the common claimed should be distinctly set forth ; for, where a deft. justified under a right of fishery, but did not say whether it was free, several, or common, his pleading was adjudged bad : *Fitz. C. P.* 2 ; 1 *Rol. Rep.* 425. If the right be for any particular cattle, or any particular number of cattle, it should be qualified accordingly in the plea, *ante*, 365. The levancy and couchancy of the cattle should be stated, except in certain cases ; see *ante*, 365. The duration and extent of the right should be stated with certainty, and accurately : 6 *T. R.* 748 ; 2 *id.* 376.

An averment, that A. B., and all those whose estate he has, from time immemorial, were accustomed, and, during all the time aforesaid ought to have common, was, on demurrer, holden inadequate to show a right of common during a whole year : *Hawkins v. Eckles*, 2 *B. & P.* 359. Where the plt. prescribed for a right of sole pasture, from the feast-day of St. Thomas, until the 18th April, and proved the exercise of the right between those periods, it was held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from Old St. Thomas' Day : *Smith v. Flower*, 3 *Bing.* 401. As to the words, "as to said messuage, &c., appertaining," &c., see *ante*, 366 ; they seem to be necessary : 1 *Saund.* 346, c. ; 3 *Lev.* 104 ; *sed vide Styles*, 428. It seems necessary to state, that deft. could not enjoy the common so beneficially as he might : see *ante*, 367. The right should be amply stated, so as to answer the whole declaration ; otherwise it will fail ; as, where trespass was brought for damage done by horses, oxen, and cows, and there was a justification to have common for two geldings only, it was holden bad : *Thornel v. Lassels*, *Cro. J.* 27 ; and see 8 *Mod.* 120. The time alleged in the declaration should also be strictly followed in the plea : 2 *Saund.* 1, 63, d. ; 2 *Rol. Ab.* 676. Although the plea be good in one part of its justification under the right, if bad in the rest, it will wholly fail : 1 *Saund.* 27. Duplicity must be avoided ; but, though issue must be taken upon a single point, it is not necessary that this single point should consist only of a single fact ; as, where the point is, that cattle are entitled to common, they must be both his own cattle, and also *levant* and *couchant*, which are two different circumstances of their being entitled to common : *Robinson v. Ro-*

*ley*, 1 *Burr.* 316; 2 *Lutw.* 1395; 1 *Saund.* 346, c. And, where it was urged that the plea was double, as stating a right of common which doth *not* lie in *prendre*, for the plt. cannot cut and take away the grass from off the common, but only feed and take it by the mouths of his cattle, and a right to cut and take away rushes, which lies \*on-ly in *prendre*, it was held, that both together constituted but but one united right: *Bean v. Bloom*, 3 *Wils.* 456; 2 *W. Bl.* 926, s. c.

*Replication.*] To a plea claiming a right of common, the plt. cannot reply *de injuria*, *Willes*, 101, but must either deny the seisin in fee, or other title to the estate, as appendant to which the deft. claims his right, or may deny the right of common, as stated in the plea, *ib.*; for, although a right of common may exist in the manor, it may be restricted in various particulars: *Gerrish v. Rodburne*, 3 *Wils.* 165; or show such grounds as will establish a ground for the plt.'s complaint, 1 *Show.* 350; or that the cattle were the deft.'s own commonable cattle, *levant et couchant*, on the premises, concluding to the country, and not with a formal traverse: 1 *Burr.* 320. But the existence of the privilege has been sometimes traversed, *Hickman v. Thorne*, 2 *Mod.* 104, and, under certain circumstances, is generally adopted; as, where it is intended to set up another prescription, 1 *Burr.* 316, inconsistent with the one first relied on, 1 *W. Bl.* 49; in which case it is necessary that the whole of a prescription should be traversed: 4 *T. R.* 157. It need not, however, be so in express terms, if, from the nature of the common, it appear that the averments are tantamount to a direct traverse, 1 *Wils.* 339; and a traverse should not be adopted after a sufficient confession and avoidance, 2 *Saund.* 1; nor made use of to negative an inference of law: 2 *H. Bl.* 182. It is said, that where the deft. has turned out other cattle, as well as his own commonable cattle, the plt. should new assign, stating, that he brought his action for depasturing the common with other cattle, and ought not to traverse the levancy and couchancy stated in the plea of justification: 1 *Saund.* 346, a. Plt. may also reply an approvement, or that the *locus in quo* has been inclosed from the common more than thirty years, and enjoyed adversely, 2 *B. & C.* 918, and see 2 *Taunt.* 156; but, if only part of the close wherein the alleged trespass was committed has been so inclosed, the plt. should reply that fact, and it would be too much to reply the whole close had been inclosed: *ib.* If the plt. new assigns to a plea of *liberum tenementum*, care should be taken that the closes newly assigned are the same with those to which the deft.'s plea applies: *Pratt v. Dome*, 15 *East*, 235. A departure must be avoided: 3 *Rep.* 247. And, where plt.'s surrejoinder admitted deft.'s right of common, but complained of a surcharge, it was held to be a departure: *Ellis v. Rowles*, *Willes*, 638; 2 *Wils.* 96.

### Precedents.

AVOWRY FOR A DISTRESS, DAMAGE FEASANT BY A FREEHOLDER HAVING RIGHT OF COMMON OVER LOCUS IN QUO.

(*Actio non, post*, "Replevin.") Because he says, that before, and at the said time, when, &c., the said deft. was, and still is, seised in his demesne as of fee, of and in a certain mes-

suage and land, with the appurtenances, situate, &c.; and that the said deft., and all those whose estate, &c., had, of and with the said messuage and land, with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have had, &c., and been used and accustomed to have, and of right ought to have had, and the said deft. still of right ought to have, for himself, and his and their tenants, farmers, occupiers of the said messuage and lands, with the appurtenances, common of pasture, in, upon, and throughout the said place, in which, &c., called —, for all his and their commonable cattle, *levant* and *couchant*, in and upon the said messuage and land, with the appurtenances, every year, and at all times of the year, as to the said messuage and land, with the appurtenances belonging and appertaining; and because the said cattle, in the said declaration mentioned, at the same time, when, &c., were in and upon the said place in which, &c., called —, depasturing, and destroying the grass when there growing and being, doing damage there, so that the said deft. "could not have or enjoy his said common of pasture there, in so ample a manner as he ought to have had and enjoyed the same; the said deft. well avows the taking of the said cattle in the said declaration mentioned, in and upon the said place, in which, &c., called —, and justly, &c., as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c.; as *post*, "*Replevin*."

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PLEA IN TRESPASS, JUSTIFYING, BY A LEASEHOLDER OR FREEHOLDER, AND HIS SERVANT,  
UNDER A PRESCRIPTIVE RIGHT OF COMMON OF PASTURE.

(*Actio non, post*, "*Trespas*." If only part of the trespasses be justified, enumerate that part in the commencement.) Because he says, &c. (stating the seisin in fee, and prescriptive right of common in the deft., if he be a freeholder, as ante, 374; or, if the deft. be a tenant, after stating the seisin in fee, and the right of common, set forth the demise, thus:.) Because he says, that G. H., before the said time; when, &c., and at the time of the making of the demise hereinafter mentioned, was seised of, and in the said place in which, &c., with the appurtenances, in his demesne, as of fee; and, being so seised, the said G. H., before the said time, when, &c., to wit, on, &c., at, &c., aforesaid, demised the said place in which, &c., with the appurtenances, to the said deft., to have and to hold the same to the said deft. for one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year, as long as the said G. H. and deft. should respectively please; by virtue of which said demise, the said deft. in his own right, and the said E. F., as his servant, and by his command, at the said times, when, &c., entered into the said close, in which, &c., in order to turn and put, and did then and there turn and put into and upon the same, the said horses, mares, geldings, cows, oxen and sheep, in the said first count of the said declaration mentioned, being the said deft.'s own commonable cattle, *levant* and *couchant*, in and upon the said last-mentioned land, with the appurtenances, to use the said common of pasture of the said deft. there; and, in so doing, the said deft. and E. F., at the said times, when, &c., with their feet, in walking, necessarily and unavoidably trod down, trampled upon, spoiled, consumed, and destroyed, a little of the grass and hay, herbs, roots, shrubs, and bushes, there growing and being; and, with the said horses, mares, &c., in the said first count mentioned, necessarily and unavoidably trod down, trampled upon, spoiled, ate up, depastured, consumed, and destroyed, a little other of the grass and hay, herbs, roots, shrubs, and bushes, there also growing and being; and because the said close, in which, &c., before and at the said time, when, &c., had been, and was, wrongfully inclosed with and by means of the said ditches, fences, and gates, in the said first count of the said declaration mentioned, before then wrongfully dug, made, and put and placed in and upon the said close, in which, &c.; so that, without filling up and levelling the said ditches and fences, and removing the said gates, the said deft. could not use or enjoy his said common of pasture, in, upon, and throughout the said close, in which, &c., in so ample and beneficial a manner as he otherwise might, and would, and ought to have done, the said deft., in his own right, and the said E. F., as the servant of the said deft., and by his command, at the said several times, when, &c., with the said pickaxes, hatchets, saws, and mattocks, and other instruments, in the said first count mentioned, filled up and levelled the said ditches, and dug up, threw down, and prostrated the said fences and gates, in the said first count mentioned, and took and carried the said gates to a small and convenient distance, where they left the same for the use of the said plt., doing no unnecessary damage to the said plt., on the occasions aforesaid, and as they lawfully might, for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned, whereof the said plt. hath above complained against the said deft. and E. F.; and this the said deft. is ready to verify: wherefore he prays judgment, if the said plt. ought to have or maintain his aforesaid action thereof against him, &c.

## PLEA IN BAR TO AVOWRY DAMAGE FESANT BY A COMMONER; DENIAL OF HIS RIGHT OF COMMON.

And the said plt., as to the avowry of the said deft., saith, that the said deft., by reason of any thing by him in that avowry above alleged, ought not to avow the taking of the said cattle *(or goods and chattels)* in the said place in which, &c., and justly, &c., because he saith that the said deft., "and all those whose estate he now hath, and at the said time, when, &c., had, of and in the said messuage and land, with the appurtenances, for the time being, from time whereof, &c., have not had, nor have been had, nor ought the said deft. still of right to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture, in, upon, and throughout the said place, in which, &c., called —, for all his and their commonable cattle, *levant and couchant*, in and upon the said messuage or land, with the appurtenances, in every year, at all times of the year, as to the said messuage or tenement, and land, with the appurtenances belonging and appertaining, in manner and form as the said deft. hath above, in his said avowry in that behalf, alleged. And this the said plt. prays may be inquired of by the country. [\*376]

See forms of pleas in trespass of prescriptive right of common, by a copy-holder, 2 *Chil. P.* 1111; by a rector, *ib.* 1112; *per cause de voisinage*, *ib.* 1113; of common of estovers, &c., *ib.* 1115; of common of fishery, *ib.* 1106; pleas in bar in replevin of plt.'s right of common, *ib.* 1198; replication of approvement of common, *ib.* 1112, 1231; replication that *locus in quo* had been inclosed from the common thirty years: *Richards v. Peake, B. & C.* 918; and *Hawke v. Bacon, 2 Taunt.* 159.

### Evidence for Defendant.

The requisite evidence to support rights of common, where they are pleaded in excuse or denial, is proof of the *title* to the right of common itself; the exercise of that right; and by deft.'s cattle, *levant and couchant*.

We have already seen what proof of *title* is requisite, and the mode of such proof, *ante*, 364; also, how the *right* of common should be proved, *ante*, 370. In addition, it may be observed, it may be shown by the testimony of old uninterested individuals, or by a grant beyond time of memory. In the absence of such proof, reputation may be resorted to, *Morwood v. Wood, 14 East*, 329; especially if supported by confirmatory evidence, *Weeks v. Spark, 1 M. & S.* 679; and, therefore, a declaration of a former tenant of a messuage, in respect of which a right of common is claimed, is admissible in evidence of such right: *Walker v. Broadstock, 1 Esp. Rep.* 458. The declarations of deceased persons may be, even in some cases, made available; and it has been held, that a paper, signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, was evidence of reputation even against copyholders not claiming under those who signed it, *Chapman v. Cowlam, 13 East*, 10; and, although a prescription pre-supposes a grant beyond time of memory, the court will allow the production of ancient grants, without date, the probability of the existence of which, beyond time of memory, must be left to the jury: *Addington v. Clode, 2 W. Bl.* 989. In some cases, a new grant will be presumed, as from an uninterrupted possession for several years, *Cowlam v. Slack, 15 East*, 1802; unless, from the proximity of the lands, a trespass might easily pass unnoticed by the commoners intruded on: *Dawson v. Duke of Norfolk, 1 Price*, 246. Or, the waste has been depastured through mistake and ignorance of the boundaries of two adjoining commons: *Hetherington v. Vane, 4 B. &*

*A.* 428. Evidence of long enjoyment of a right of common is, however, strong proof, unless rebutted by contrary presumptions: *Drewry v. Moore*, 1 *Stark.* 102, *ante*, 370.

The exercise of the right must be proved, to justify the tort; and that the supposed tort was necessary to obtain the enjoyment of such right: *Lit. Rep.* 295; *Bryan v. Winwood*, 1 *Taunt.* 208.

The *property* in the depasturing cattle must be proved: this is a material and traversable part for the plt. in his admissions.

The *levancy* and *couchancy* of the cattle must be proved, under a plea. [\*377] justifying the entrance of them into *locus in quo*, in exercise of right of common: see *Rogers v. Brustead*, *Selw. N. P.* 440; *the Bailiffs, &c. &c. of Tewkesbury v. Bricknell*, 1 *Taunt.* 142. It has been holden unnecessary to support claim of, for cattle *levant* and *couchant*, that the common should be adequate to the support of the cattle for any length of time: *Willis v. Ward*, 2 *Chit. Rep.* 297.

#### *Evidence for Plaintiff.*

Where, in answer to the right, an inclosure is set up by the lord, some act of approvement should be adduced, to show his intention to inclose, and the courts will take notice judicially of his right to do so. Where the lord has put in issue that the *locus in quo* is his soil, and freehold, he should be prepared with old grants, deeds, leases, &c.: *Wool.* 334. An issue is frequently joined on the sufficiency of common left for the tenants; in which case the lord must prove that he has not taken so much as to deprive them of pasturage for their cattle; but he will not be allowed to do this under a replication of *de injuria* to a justification of right of common: he ought to plead his inclosure specially, and aver that he has left sufficient common: *D. Ayrolles v. Howard*, 3 *Burr.* 1385. Owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses: see *How v. Strode*, 2 *Wils.* 269. The lord may show a long custom to erect houses on the waste, in exclusion of the commoners; or his tenant claiming under him, sued by a commoner, may prove a constant usage on the part of lords of the manor to grant strips of land, for the purpose of building, which is usually done with the consent of the homage: *Wool.* 335; 5 *T. R.* 417. Counter-parts of old leases, from the muniments of a manor, showing that part of the waste has been demised by the lord, although unaccompanied by proof of enjoyment, will be evidence to establish a custom for the owners of moss-dales to hold them in severalty after they have been entirely cleared of turves by the tenants of the manor: *Clarkson v. Woodhouse*, 5 *T. R.* 412, *n.* Allotments under inclosure acts may also be given in evidence, both at the instance of lords and commoners: *Wool.* 336. To destroy a plea of common vicinage, no further proof is needful, than that the lord of either of the wastes has entirely inclosed some part, however small: 3 *Rep.* 24; *Wool.* 336. But, if there be the least avenue for egress and ingress (not being a defect of fencing), whereby the cattle may mutually escape, the common of vicinage continues: *Gullett v. Lopez*, *Bart.* 13 *East*, 348. However, on a plea of inclosure, care must be taken to prove that every part of the *locus in quo* has been inclosed: 2 *Taunt.* 656. Evidence that

cattle of a former tenant of the premises, in respect of which the right is claimed in the right at issue, have been impounded, will (if uncontradicted) be material evidence to negative such a right: 1 *Esp. Rep.* 459. A release is also good evidence to destroy an alleged prescription: as, where a claim was made for common appendant, and it was shown that a release had been executed as to five of the acres in which the party prescribing had common: *Rotheram v. Green*, *Noy's Rep.* 67. An allegation of a restricted right of common may be rebutted by parchment writings, which show that there existed once a general right; and, if they unfold a private prescription or grant, it will fail. . Where a right of common is claimed in respect of an ancient house, it will be a good answer, to show the house to have been built within twenty years: *Dunstan v. Tresidor*, 5 *T. R.* 2.

*As to Competency of Witnesses, ante*, 371.



## COMPOSITION.

[\*378]

**ITS EFFECT.**—*When it operates as a satisfaction of the original Debt.*—*When entered into by Deed*, 378.—*Where Creditor assigns his Effects, ib.*—*Where several Creditors mutually agree*, 379.—*Where a different Security is accepted, ib.*—*Where a third Person is Security, ib.*—*Where a Composition is void as to one or more Parties, ib.*—*Where the Creditor is discharged, ib.*—*Where the Surety is discharged, ib.*—*Where it operates as an Escrow*, 380.

**PLEA OF**, 380.

**EVIDENCE ON**, 380.

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*Its Effect.*

*When entered into by Deed.*] The mere consent or accord of the creditors to accept a composition from his debtor, will not operate as an accord and satisfaction of the original debt, and is a mere *nudum pactum*: *Heathcote v. Cruickshanks*, 2 *T. R.* 24, *Lyn v. Bruce*, 2 *H. Bl.* 317. However, if it be made by deed, containing a release or covenant not to sue, it will be binding; but, if made verbally, or by instrument not under seal, there must be some sufficient consideration to warrant the creditor in giving up his original debt; as, 1st, where the debtor assigns his effects to trustees; 2d, where a third person becomes surety for the payment; 3dly, where several creditors, on the faith of each other's undertaking, compound, &c. In which case, the acceptance of a smaller sum is a satisfaction for a larger, and will discharge the debtor.

*Where the Debtor assigns all his Effects to trustees*, in order to make an equal distribution amongst all his creditors, he will be discharged, 2 *T. R.* 24-8; as, by assigning all his effects, he deprives himself of all means of payment: *Cork v. Saunders*, 1 *B. & A.* 48-9. And he will be discharged, when a creditor, by his undertaking to accept a



composition, induces the debtor to part with his property to his creditors, or induces other creditors to discharge the debtor, *Wood v. Roberts*, 2 Stark. 417, to enter into a composition-deed, or deliver up securities to him, *Butler v. Rhodes*, 1 Esp. Rep. 236; *Cranley v. Hillary*, 2 M. & S. 120, 2 Stark. 417; and, in this case, though he remain in possession as servant to the trustees, he will not be liable for the neglect of the trustees, nor will such neglect remit the creditors to their original right, unless that event be provided for by the terms of the agreement: *Cork v. Saunders*, 1 B. & A. 46.

Where several Creditors mutually stipulate, on the faith of each other's undertaking, and with the knowledge of each other, to give time to, or accept a composition from a debtor, though for a less sum than the original debt, such agreement will be binding on every creditor who is party to it, as it secures the creditors in general "an equality of benefit, and mutuality of security;" *p. Ld. Ellenb.: Leicester v. Rose*, 4 East, 381; *Boothby v. Sowden*, 3 Camp. 175; *Cranley v. Hillary*, 2 M. & S. 122; 16 Ves. 374. And any secret bargain between the debtor and one of the creditors, to pay a further sum of money, or give a better or other security than that stipulated for by the rest of the creditors, is void, as a fraud on the other creditors: *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 ib. 166; *Smith v. Bromley*, 2 Doug. 695; *Jackson v. Davidson*, 4 B. & A. 695-7; *Leicester v. Rose*, 4 East, 372, 381; 4 Moo. 78; *Coleman v. Waller*, 3 [\*379] *Younge & Jerv.* 212. Nor is any security \*obtained by virtue of such secret bargain valid, *Wells v. Girling*, 1 B. & B. 447; 4 Moo. 78, s. c., as it is a general rule, "that every private bargain, the effect of which is to give one creditor an advantage over the others, is void, the principle of composition being, that all creditors shall stand on the same footing;" *p. Littledale, J., Lewis v. Jones*, 4 B. & C. 515. However, where there is nothing said in the agreement about collateral securities, a creditor will not, by availing himself of them, commit a fraud upon the other creditors, who have no such securities; unless the persons against whom he enforces those securities have their remedy against the insolvent, and the estate be ultimately diminished: *Thomas v. Courtney*, 1 B. & A. 1, 6. If it be agreed that securities shall be given up, any creditor receiving money thereon will be held to recover for the debtor's use: *Stock v. Mawson*, 1 B. & P. 286. It is a fraud in a creditor who agreed to the composition, though reluctantly, to sue the debtor: *Cranley v. Hillary*, 2 M. & S. 120; *Steinman v. Magnus*, 11 E. 390.

Where a different Security is accepted by the creditor in satisfaction of his debt, the debtor will be discharged on the payment of a smaller sum; however, the party must have received the benefit of such security: *Drake v. Mitchell*, 3 East, 259; *Walker v. Seaborne*, 1 Taunt. 526.

Where a third Person is Security for the whole or part of the composition-money, all persons who agreed to accept such security will be bound thereby, and it will operate as a satisfaction: therefore, an agreement, whereby the creditors agreed to receive 20 per cent. in satisfaction of their several demands, and released the remainder, in considera-

tion that half of the composition should be secured by the acceptances of certain of the creditors, which was done, will be binding, if, upon the faith of it, a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder of his debts; and still more, when other creditors have been lured in, by the agreement, to relinquish their further demands, will the agreement be binding; and it would be a mixed question of law and fact to go to the jury, whether, after the plts. had entered into this composition, in conjunction with the other creditors, it were not a fraud upon those persons within the principle of the case of *Cockshott v. Bennett*, 2 T. R. 763, to endeavour to obtain a further payment from the defendant, when they all purposed to liberate upon the terms of that agreement: *p. Ld. Ellenb., Steinman v. Magnus*, 11 East, 394.

But the money must be paid; for, although a debtor compounding with his creditors for 12s. 6d. in the pound, gives them the security of a third person for the payment of 7s. 6d., he is not discharged upon the payment of that sum only, if the residue of the 12s. 6d. be unpaid: *Walker v. Seaborne*, 1 Taunt. 526.

*When, by Fraud, the Creditor is discharged from his Agreement.]* If any fraudulent representations have been made, whereby the creditor is induced to agree to accept a composition, it will not be binding if such representation be untrue, 6 T. R. 263; but misrepresentations as to the legal effect of the agreement are immaterial, and do not avoid it, as every man is supposed to know the legal effect of the instrument which he signs: *Lewis v. Jones*, 4 B. & C. 506, 512; *vide ante*, 378, "*Where several creditors*," &c.

*Where Sureties are discharged.]* If misrepresentation is used, or time given to, or there is a compounding with the original debtor, or there would be a fraud on the original debtor. And *misrepresentation* will avoid the contract; "for it is the duty of a party, taking a guarantee, to put the surety in possession of all the facts likely to affect the degree of his responsibility; \*and, if he neglect to do so, [\*380] it is at his peril, and the concealment of a material fact avoids the contract:" *p. Bayley, J., Pidcock v. Bishop*, 3 B. & C. 610. And any secret bargain between the debtor and creditor to pay a further sum, or old debt, will discharge him: *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Duchaire*, 3 T. R. 552, 3; *Pidcock v. Bishop*, 3 B. & C. 655, *Williams v. Rawlinson*, 3 Bing. 71; *Lewis v. Jones*, 4 B. & C. 506, 515, (a.); *English v. Darley*, 2 B. & P. 61; *Leicester v. Rose*, 4 East, 372. And, if A. be induced to pay B. a composition on the debt due to him from C., and B. agrees to take the money in full of his claim, he cannot afterwards sue C., or a person who was before surety for him, unless A. assented to the surety remaining liable: *Lewis v. Jones*, 4 B. & C. 506.

*Giving time to, or Compounding with,* the debtor, will, on analogous principle, discharge the surety, as it alters his situation, or extends his risk: *ib.* And it would also be a fraud on the original debtor, if the party, by giving time to the debtor himself, were allowed to sue the surety thereon, as, if the creditor recovered, his surety would have his

remedy against the original debtor forthwith: *English v. Darley*, 2 B. & P. 61; 6 Ves. J., 805, 18; *ib.* 20; 4 B. & C. 515, (a).

*When an Agreement, or Deed of Composition, operates as an Escrow.*] An agreement for a composition ought to contain a clause, that the instrument would be void, unless all the creditors signed it; for, otherwise, the object of the instrument may be defeated: for, if a creditor sign such instrument generally, he becomes a party to it, and will be bound by it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at the time when they executed it: *p. Bayley, J. : Lewis v. Jones*, 4 B. & C. 512. But, in a deed where such a proviso was omitted, but before the deed was executed by a person who was to be surety for the composition-money, it was stated, in his presence, that the deed should be void, if not executed by all the creditors, and he at the same time delivering the deed in the usual way, and with the usual words, it was held, that it was delivered as an escrow, and that the surety, on the failure of some creditors to execute it, was not bound by the deed: *Johnson v. Baker*, 4 B. & A. 440. But, where a deed, reciting debts to A. and B., upon judgment, who were to be paid first, and then the other creditors to be paid in composition, contained a proviso, "that if any creditor, whose debt amounts to £150, should not execute the deed within three months, it should be void;" and A. and B., whose debts respectively exceeded that sum, not executing the deed, it was held not to avoid it, the intention manifestly being, that those creditors only, who were to receive the composition, were to execute it: *Wells v. Greenhill*, 5 B. & A. 869.

A party, who executes a composition-deed, is bound to the extent of the whole debt due to him, if he do not specify the amount opposite his signature: *Harroby v. Wall*, 1 B. & A. 103.

#### *Plea of.*

Where the debt's debt (a simple contract one) has been satisfied by his creditors entering into a composition-deed for that purpose, such deed need not be specially pleaded in an action for the original debt, but be set up as a defence under the general issue; it, however, is advisable to plead where the plt. is likely to reply matter admitting the existence of the instrument, but disputing its validity as on the ground of fraud.

#### *Evidence of Composition.*

When the composition is *by deed*, the deed should be produced, and proved by the subscribing witness, and no verbal declarations [\*381] of the parties \*can be received in evidence to give it a meaning different from that which appears on the face of it, or to avoid its effect, though the party signed the instrument on the faith of such representations: *Lewis v. Jones*, 4 B. & C. 513. As to when such deed will be an escrow, see other points of evidence: *vide post, tit. "Bond," "Evidence."* Plt. may show what is void as to him, as where it contains a proviso that it shall be so if all and every of the creditors should refuse to execute or consent to the deed; but plt. must

prove that it was tendered to some one of the creditors to execute, as his absolute refusal, in the event of his mere non-execution of it, will be insufficient, *Holmes v. Love*, 3 B. & C. 242; but, unless the deed contain a positive stipulation that it shall be void, he cannot avail himself of the fact of the other creditors not having signed it, though he himself signed under a verbal representation for the party, that it would be void unless signed by all the creditors. He may also show, that he is discharged by reason of fraudulent representations made to him, when he was induced to sign: *ante*, 379.

Although the plt. has not executed any deed, the deft. may prove that plt. *agreed* to take a composition, secured by some collateral security, as the notes of a third person, and that such acceptance was actually *received* by the plt.; for, although a debtor gives the security of a third person for payment of a part of a *stipulated dividend*, he is not discharged upon payment of that part only, if the residue of it continues unpaid, *Walker v. Seaborne*, 1 Taunt. 526, *supra*; or, in some cases, that deft. has fully *completed* his part, according to the terms of the accord *by actually tendering* such notes to the plt.: *Bradley v. Gregory*, 3 Camp. 384; *Cranley v. Hillary*, 2 M. & S. 1202.

A deft. may prove, that, on the faith of plt.'s undertaking to receive a composition from him, he executed a deed of assignment of all his property to a trustee, for the benefit of his creditors, and that plt. refused to sign the deed of composition: *Butler v. Rhodes*, 1 Esp. Rep. 236, *supra*. However, deft. should prove that the deed was tendered to plt., and that he *refused* to execute it: *ib.*; *Holmes v. Love*, 3 B. & C. 242. Plt. may, however, void the effect of such undertaking, by showing that he did it from deft.'s misrepresentations: *Cooling v. Molyneux*, 6 T. R. 263, *supra*.

Deft. may also prove, that plt. is one of several creditors who promised to sign a composition-deed, and that, upon the faith of his signing it, others were induced to accept a composition: *Boothbey v. Lowden*, 3 Camp. 175; *Wood v. Roberts*, 2 Stark. 217; *Brown v. Cornish*, 1 Ld. Raym. 217, *supra*.



## CONFIDENTIAL COMMUNICATIONS.

*Post*, "WITNESSES."



## CONSTABLE.

See "OFFICER."



## CONTRACT.

See "ASSUMPSIT."

[\*382]

## \* CONVICTION.

*Its Effects in Evidence.  
How Proved.*

*Its Effect, and when Admissible in Evidence.*] A conviction in a court of criminal jurisdiction is evidence of the same fact coming collaterally into controversy in a court of civil jurisdiction: *B. N. P.* 245; *Gilb. Ev.* 30. But, if the conviction has been procured on the evidence of the party who seeks to avail himself of it in a civil action, it is not admissible; and it seems doubtful whether it can be received in evidence, when it has not been procured on the sole evidence of the party, or even where it has been procured entirely on the evidence of others, if at the party's own instance: *Hillyard v. Grantham*, cited 2 *Ves.* 246; *Gibson v. Maccarty*, *Rep. temp. Hardw.* 311; *Burdon v. Browning*, 1 *Taunt.* 520; *Brook v. Carpenter*, 3 *Bing.* 300; 1 *Phil. Ev.* 320. Nor will it be received to contradict the witnesses in a collateral proceeding, by showing that they had before given a different account before the committing magistrate: *Rez v. Howe*, 1 *Camp.* 461.

When a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction, if no defects appear upon the face of it: *p. Dallas, C. J. Brittain v. Kinnaird*, 1 *B. & P.* 440. So, in trespass against magistrates for taking and detaining a vessel, a conviction by them under the Bum-Boat Act is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned: *ib.* 432; *Wickes v. Clutterbuck*, 2 *Bing.* 483. And so, a conviction will justify the magistrates under the general issue in an action of trespass, not only in respect of such facts as may be necessary to give them jurisdiction, but also upon the merits of the conviction: *Gray v. Cookson*, 16 *East*, 13. A conviction cannot be controverted in evidence; the justice having a competent jurisdiction of the matter, his judgment is conclusive till reversed or quashed: *p. Yates, J., Strickland v. Ward*, 7 *T. R.* 634, *n.* And, in trespass against two magistrates for giving plt.'s landlord possession of a farm, as a deserted farm, they produced in evidence a record of their proceedings under the act of 11 *G. 2*, c. 19, s. 16, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute: it was held, it was conclusive as an answer to the action: *Rasten v. Carew*, 3 *B. & C.* 649. In this case, *Abbott, C. J.*, observed, "That where justices of the peace have an authority given to them by an act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do to originate their jurisdiction, a conviction, drawn up in due form, and remaining in force, is a protection in any action brought against them for the acts so done."

*How Proved.*] The conviction should be proved to be under the hand and seal of the magistrate; and it will be sufficient evidence that the judgment it recites was given: *Fuller v. Fotch, Holt, Rep.* 287;

*Carth.* 346. If a valid subsisting conviction be proved at the trial, which appears by the date to warrant the act done under it, the collateral proceeding, or where the conviction is not directly impeached, evidence as to the time when it was actually drawn up, will not be received: *Massey v. Johnson*, 12 *East*, 82; *Gray v. Cookson*, 16 *East*, 20-1.



COPY.

[\*383]

*Post*, "SECONDARY EVIDENCE."



COPYHOLD.

*Proof of Party being a Copyholder*, 383.—*Proof in Ejectment for, post*, "*Ejectment*."—*Proof of Surrender and Admittance*, 383.—*Proof of Custom of, ib.*—*Proof by Court-Rolls, ib.*

*Proof of Party being a Copyholder.*] This may be done by proof of his admittance and identity: *Doe v. Hillier*, 3 *T. R.* 162, *infra*. As to ejectment by, see *post*, "*Ejectment*."

*Proof of Surrender and Admittance to.*] The rolls of the customary court, or examinal copies of such rolls, of the surrender and admittance, properly stamped, will be evidence of such surrender and admittance: *Doe v. Hall*, 16 *East*, 208. They are the public documents by which the inheritance of every tenant is preserved, 1 *Phil. Ev.* 397, 8, or registered entries of the surrender, and need not be produced stamped, according to 48 *G. 3*, c. 149: *Doe v. Hall*, 16 *East*, 208. Some evidence of the identity of the party admitted should be adduced: *Doe v. Smith*, 1 *Camp.* 197.

*Proof of Custom of.*] The custom must be proved to have existed since the time of legal memory: 4 *Leon.* 242; *post*, "*Custom*." The court-rolls, or examined copies from them, duly stamped, are the most usual evidence of the custom; the same may, however, be proved by the steward, or some ancient person, who has long known the manor and its customs. In an action by a copyholder against the freeholder of a manor, certain parchment writings, preserved among the muniments of a manor, dated in 1698, and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, were held to be evidence of the reputation of the manor at the time, as to a presumptive right of common set up by the deft.: *Chapman v. Cowlan*, 13 *East*, 10. An entry on the court-rolls, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taking according to it be proved: *Roe v. Parker*, 5 *T. R.* 26; 10 *East*, 520. Ancient writings, not properly court-rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been

made *a pengu omnium tenentum*, have been admitted as evidence, to prove the course of descent within a manor: *Denn v. Spray*, 1 T. R. 466.

*Proof by Court-Rolls.*] We have already seen in what instances they are proof of a party being a copyholder, of a surrender and admittance or custom; it may be here further added, that court-rolls, whether of the court-baron, or customary-court, are evidence between the lord of the manor and his tenants, or copy-holders, *B. N. P.* 247, 1 *Phil. Evid.* 397; and entries made by a steward in his book, respecting admissions, receipt of fines, &c., connected with the manor, are also evidence. The court-rolls are usually produced and proved by the stewards, [\*384] but examined stamped \*copies will do: 16 *East*, 208. If it be necessary to prove any entry in the *steward's book*, it must be regularly produced, be identified as the book kept by the steward of the manor, and his handwriting to the several entries must be proved; but, when the book was of thirty years of age, it was held sufficient to make it evidence to prove that it came out of the proper custody, without proving the steward's handwriting subscribed to the entry: *Wynne v. Trewhitt*, 4 B. & A. 376. It may be as well observed, that, on the application of a tenant, the Court of K. B. will compel the steward to give the tenant leave to inspect the court-rolls: *Rex v. Shelley*, 3 T. R. 141.



## COPYRIGHT.

FORM OF REMEDY FOR INJURY TO, 384.

FORM OF PLEADINGS, *ib.*

PRECEDENTS, *ib.*

EVIDENCE FOR PLAINTIFF, *ib.*

EVIDENCE FOR DEFENDANT, 385.

### *Form of Remedy for Injury to.*

THE 54 G. 3, c. 156, s. 4, gives a special action on the case, and double costs against the party infringing a copyright. A special action on the case may be maintained against a person for infringement of a copyright, under the 8 Anne: *Miller v. Taylor*, 4 Burr. 2380; *Ewer v. Jones*, Salk. 415; *Donaldson v. Becket*, 4 Burr. 2409; *Beckford v. Hood*, 7 T. R. 620. An action lies at common law: 7 T. R. 627; 1 Camp. 97, n. a. An action lies for printing the new corrections and additions to an old work: 1 East, 359. Under 8 Anne, an action may be maintained for pirating a single sheet of music, *Clementi v. Goulding*, 11 East, 244, *Back v. Longman*, Cowp. 623; or for a print, under 8 G. 2, c. 13. *Roworth v. Wilkes*, 1 Camp. 94. Besides this action for damages, there are various penalties created by the statutes of 8 Anne, c. 19, 41 G. 3, c. 107, and 54 G. 3, c. 156, for which a party may proceed by action.

*Form of Pleadings.*

There is nothing peculiar to distinguish the pleadings in this from any other action in case. The averment of deft.'s wrongful intent is immaterial: 1 *Camp.* 98. It is not usual to negative plt.'s *written* consent to the piracy: 7 *T. R.* 320.

The plea is usually the general issue, as in other actions on the case. Twelve months is the time limited for bringing the action.

*Precedents.*

See the various forms in 2 *Chit. Pl.* 760; 8 *Wentw.* 420; 7 *T. R.* 518, 620. See precedent on 54 *G. 3*, c. 156, 2 *B. & C.* 681.

*Evidence for Plaintiff.*

The assignee of a copyright must show the assignment to have been in writing: *Power v. Walker*, 4 *Camp.* 8; 3 *M. & S.* 7, s. c. And, where an author publishes his work, and afterwards sells the right, but no agreement \*or consent in writing was entered into, [\*385] in 1814 the assignee published the work, and, in 1818, B. infringed the copyright, and in 1822, the author, by a proper assignment in writing, assigns to the assignee the exclusive right: it was held that the assignee did not, by the parol assent of the author in 1814, acquire the exclusive right of publishing the work, and that the author could not afterwards, in 1822, by making a valid assignment to the assignee, enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed: *Clementi v. Walker*, 2 *B. & C.* 861; 4 *D. & R.* 598. The assignee of a print may maintain an action for pirating it, and his right will be established by producing one of the prints taken from the original engraving, the production of the plate itself not being deemed requisite; the date must also appear on the print: *Thompson v. Symonds*, 5 *T. R.* 41. In an action by the author of the work, it is necessary to establish his right by production of his own work, and also produce the publication of the deft., to establish, by comparing the two, the fact of piracy; and it will not be necessary for plt. to prove the entry of his work at Stationer's Hall, *Beckford v. Hood*, 7 *T. R.* 620; such entry only being necessary to be proved where the party proceeds for the penalty under 8 *Anne*: *ib.* 627; *Tonson v. Collins*, 1 *W. Bl.* *R.* 230. Nor is it incumbent upon the plt. to prove that his name was attached to the title-page of the work. So, where it appeared that two editions of the work were without the author's name prefixed to it, and the title-page of the third edition bore his name, and, after its publication, deft. printed it, proof of these facts was sufficient to entitle plt. to recover: *Beckford v. Hood*, 7 *T. R.* 620. And, though the work be not printed, but only in manuscript, yet will the plt. be entitled to recover damages for the infringement of it: *White v. Geroch*, 2 *B. & A.* 298; 1 *Chit. R.* 24, s. c. In an action for pirating a musical composition called A., the right of the author to maintain the action is well supported, by showing him to be the author of a musical composition of that name, comprised in and occupying only one page of a work with a different title, which contained several other musical compositions: *ib.* In an action for penalties, on proof of distinct acts of sale,



plt. may recover several penalties incurred on the same day : *Brooke v. Milliken*, 3 T. R. 509. Proof of having been seen correcting the manuscript of a work afterwards pirated is not sufficient evidence of being the author: *Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625, s. c.; 2 C. & P. 163. Evidence of the plt.'s having made additions and alterations in a work in which originally he had no interest, is sufficient evidence of his copyright to enable him to maintain an action: *Cory v. Longman*, 3 Esp. Rep. 273; 1 East, 358, s. c. In *Sayer v. Dacey*, it was held that the proprietor of a mezzotinto or other print, to entitle himself to the benefit of 8 G. 2, c. 13, must engrave both his name and the day of the first publishing thereof on the plate, and print the same on the print: 3 Wils. 63; but see *Rouworth v. Wilkes*, 1 Camp. 98, where *Ld. Ellenb.* observes, "Although the plt.'s name be not engraved upon the prints, if there has been a piracy, I think him entitled to recover." Proof that deft. had acted a piece on the stage, of which plt. had bought the copyright, is not evidence of a publication within the meaning of the 8 Anne, c. 19: *Colman v. Wathen*, 3 T. R. 245.

#### *Evidence for Defendant.*

In answer to plt.'s proofs, deft. may show that the work was of an immoral tendency; and it will be no answer to the objection that the deft. is also a wrong-doer in publishing it, and therefore cannot set up its immorality: *Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163, s. c. And, in an action against him by an assignee, he may show the assignment to be invalid, as not being in writing, *Power v. Walker*, 3 M. & S. 7, 4 Camp. 1, s. c.; or, in an action [\*386] against him by the author, \*he may give in evidence a declaration by him that he had parted with his copyright, when the law will presume a valid assignment: *Moore v. Walker*, 4 Camp. 9, n. But evidence that the plt. acquiesced in the publication by the deft. six years previous, will not be proof of an assignment, *Latour v. Bland*, 2 Stark. 382; nor will proof of a receipt given by the plt. for money received by him as the price of his copyright: *ib.* It will be no defence for the deft. that plt. had improperly obtained the copyright in the first instance: *Carey v. Kearsley*, 4 Esp. Rep. 168.



### CORPORATION.

FORM OF REMEDY BY, 386.—AGAINST, *ib.*

FORM OF PLEADINGS, 387.

EVIDENCE, *ib.*

COMPETENCY OF WITNESSES, 388. .

#### *Form of Remedy.*

*Actions by.*] Assumpsit may be maintained by a corporation, 2 Lev. 252, *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466, 5 B. &

*A.* 204; and this even for use and occupation, where the tenant has paid rent, *May. of Stafford v. Till*, 4 *Bing.* 75, 12 *Moo.* 260. And a revived corporation remains the same, as to debts and rights, as the old one, and so may maintain an action on a bond given to the old corporation; *Colchester v. Seaber*, 3 *Burr.* 1872, *Co. D. Biens, C. Bac. Ab. Corp. E.* 4; and its right will be the same, even though its revived name be different: *Haddock's case*, *T. Raym.* 439. Assumpsit may be supported by a foreign corporation in this country in their corporate name: *National Bank of St. Charles v. De Bernales, R. & M.* 190.

It has been determined that the mayor of a corporation, who, on the sale of certain lands by auction, of which the corporation were the vendors, signed a contract on behalf of himself and the corporation with the purchaser, for the due performance of the conditions of sale, could not, in his individual capacity, maintain an action against such purchaser for a breach of his contract: 2 *Taunt.* 374, 387.

*Actions against.]* Trover may be supported against a corporation, *Yarborough v. Bank of England*, 16 *East*, 6, *Duncan v. Surrey Canal*, 3 *Stark.* 50; and they will be liable, though the conversion be by their agent, acting under the direction of a committee appointed for managing the affairs of the company: *ib.* And corporations and incorporated companies may be sued in that character in many instances for damages arising from the neglect of a duty imposed on them by particular statutes: *Chit. Pl.* 65. In *Yarborough v. Bank of England*, *Ld. Ellenb.* observed, "The instances of actions against corporations for false returns to writs of mandamus directed to them must be numerous:" 16 *East*, 9. A corporation may be defts. in an action of *quare impedit*, and the hindrance is an act of tort: *Butler v. Bishop of Hereford and University of Cambridge*, *Barnes*, 350. It has, however, been held, that trespass and replevin cannot be maintained against a corporate body in their character as such, but that separate actions must be brought against each individual committing the wrong: *Bar. Ab. Trespass, pl.* 239; *Bar. Ab. Corporations, E.* 2, 5; *Doe v. Woodman*, 8 *East*, 230; *Harman v. Tappenden*, 1 *East*, 555. Assumpsit will lie against a corporation upon a bill of exchange, the power to draw \*and accept being recognized by statute, *Murray v. E. I.* [\*387] *Comp.*, 5 *B. & A.* 204, *Broughton v. Manchester Water Works*, 3 *ib.* 1; and so in the case of promissory notes, 3 and 4 *Anne*, c. 9. But, except where the contracts appear sanctioned by legislative enactments, 6 *Vin. Ab.* 317, *pl.* 49, assumpsit on parol agreement cannot be maintained against a corporation, and debt is the only remedy: *Slack v. Highgate Archway Company*, 5 *Taunt.* 792; 5 *B. & A.* 204.

### *Form of Pleadings.*

A corporation must, in all legal proceedings, be described by their corporate name: 1 *Leach*, 253, 4 *ed.* 253. A mistake in the corporate name may be pleaded in abatement: 1 *B. & P.* 40. As to describing incorporated companies, see *post*, 1 *Leach*, 513, 8 *T. R.* 508. Where a corporation brings an action for any due, it is sufficient to state, in a *declaration*, though it would be otherwise in a plea, that it is an ancient borough, and that the burgesses thereof, and for divers years, have been

a body politic, in the name of the mayor, &c., without setting out the name of incorporation, or any title to the duty; for, the declaration being founded upon their possession, there is no necessity to state a title to the thing: 1 *Saund.* 340, n.; *Owen*, 109.

A plea by a corporation aggregate, which is incapable of a personal appearance, must purport to be by attorney: *Bro. Ab. Corporation*, 28; *Co. Lit.* 2, B. 2.

### *Evidence.*

*Proof of Charter, &c.*] As to this, *ante*, "Charter."

*Proof of Corporation Books.*] As between the members of a corporation, the production of their books is sufficient to establish the plt.'s title to maintain an action, *Mayor of London v. Mayor of Lynn*, 1 *H. Bl.* 214; but this will not be admissible as evidence against a stranger, *ib.*, *Marriage v. Lawrence*, 3 *B. & A.* 142, see *ante*, "Books;" except, perhaps, where it may be received by consent of the parties, *Hull v. Homer*, *Cowp.* 102; and, on a question of public right, the books of a corporation are always admissible: *Gibbon's case*, *How. St. Trials*, 810, 854. If corporation books have been publicly kept as such, and the entries made by the proper officer, or by a third person acting for him, in case of absence or sickness, they may be given in evidence, *R. v. Mothersell*, 1 *Str.* 92; but a book kept by the prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence: *ib.* Where the books are ancient, it must be shown that they come from the proper custody, as from a chest which has always been in the custody of the clerk of the corporation, *Mercers of Shrewsbury v. Hart*, 1 *C. & P.* 114; and it is insufficient if they are produced from a chest found in the house of a former clerk, after his death: *ib.* Where, in order to prove a person a freeman of Evesham, a copy, upon a two-shilling stamp, was produced, of a loose paper upon a file, which the witness said was also on a two-shilling stamp, and it appeared that there was a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the freeman was originally admitted, but this was not on a stamp in the book, it was held by *Noel, J.*, that the loose paper, being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of it was good evidence: *R. v. Head*, *Pea.* 92, (n).

[\*388] Corporation books may be proved by examined copies, *Brocas v. Mayor, &c. of London*, 1 *Str.* 308; but, if they do not relate to corporate acts, the original must be produced: *R. v. Gwyn*, 1 *Str.* 401.

*Seal of.*] This must be proved to be genuine by a witness acquainted with it, *Moises v. Thornton*, 8 *T. R.* 307: but it is not necessary to call a witness who saw the seal affixed: *ib.* The seal of the corporation of London has been held to prove itself: *Doe v. Mason*, 1 *Esp. Rep.* 53. Proof of payment of rent to the bailiffs of a borough, by the party, as tenant to a corporation, is sufficient to show a tenancy from

year to year, although an indenture was executed by the bailiffs and some of the aldermen of the borough, which was sealed with their individual seal, instead of the corporate one: *Wood v. Tate*, 2 N. R. 247.

### *Competency of Witnesses.*

In cases where a member of a corporation can derive any personal benefit from the verdict, he is excluded:—thus, on an issue on a *mandamus*, whether the election of common-council-men in a borough was not confined to a particular description of people, it was decided that one of such persons was incapable: *Stevenson v. Nevinson*, 2 Ld. Raym. 1350. And, in an action of trespass, where the point was, whether a corporation, which had enclosed, had left a sufficiency for the commoners, a freeman was considered incompetent to prove the affirmative: *Burton v. Hinch*, 5 T. R. 174. But the contrary seems to have been decided; and it has been held, that where the interest was inconsiderable, members of a corporation were competent. Thus, in the case of the mayor and commonalty of London, 2 Lev. 231, and that of the city of London, concerning water-bailage, 1 Vent. 351, the point in issue was, whether the corporation was entitled to certain tolls in the first case: it was ruled by the whole court, and by three judges in the last, that freemen (members of the corporation) might be witnesses in support of the claim, because the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must therefore be inconsiderable: *Phil. Ev.* 67; but this was questioned by *Buller, J.*, B. N. P. 290; *R. v. Mayor of London*, 2 Lev. 231; *R. v. Carpenter*, 2 Show. 47; and 1 Vent. 351. And, in an action against the governors of the Foundling, for work done by plt. for the use of the hospital, several of the governors were admitted as evidence for the defence: *Weller v. Gov. of Foundl. Hosp.*, Pea. Rep. 153. Where the witness is objected to as being a member of a corporation, his competency may be restored by his resignation (which will be effectual even by parol, if it has been accepted and acted on, 2 Salk. 432), or by disfranchisement, 1 P. Wms. 595, 11 Mod. 225.



## COVENANT.

NATURE OF REMEDY, AND WHEN IT LIES, 338.—*Parties to Action:*  
*Plts.* 389, *Defts.* 391.

FORM OF PLEADINGS, 392.

PRECEDENTS, 394.

EVIDENCE, 395.

### *Nature of Remedy, and when it lies.*

AN action of covenant is of a technical nature (5 B. & C. 602), and, in cases where a party has covenanted or engaged by deed to do certain \*acts, it will enable him to recover damages for the [\*389] breach of such covenant or engagement under seal, as for breaches of covenants in deeds of conveyance, whether by deed, poll,

or indenture of apprenticeship, 1 *B. & C.* 460; of separate maintenance, 2 *B. & C.* 547, 4 *D. & R.* 11; of good title, 1 *B. & C.* 13, 3 *D. & R.* 195, 2 *Saund.* 175, 8, 181; of charter-parties of affreightment, 6 *Moo.* 415, 3 *East*, 233, 1 *N. R.* 104; on policies of assurance under seal, against fire, &c. 6 *T. R.* 710, 2 *Marsh.* 601, *n. a.*, 6 *Moo.* 199; on articles of agreement under seal, 5 *B. & C.* 48, 7 *D. & R.* 800. But, in practice, it occurs more frequently on leases: see post, "Lease," "Landlord and Tenant." It lies as well on covenants implied from the terms of the deed, as on those which are express: thus it will lie by the lessee against the lessor, upon the word *demise* in the lease; as that word imports a covenant in law on the part of the lessor, that he has good title, and that the lessee shall quietly enjoy during the term; and, therefore if the lessee be ousted during the term, an action of covenant will lie: *p. Littledale, J.*, 5 *B. & C.* 609, 8 *D. & R.* 368. So, if the party demise *reddendo* rent, that word is equivalent to a covenant: *Com. D. Cov. A.* 4; 1 *Roll.* 419, 625. There are a few cases in which it lies, though the defl. do not seal (these, however, are exceptions:) thus, on the letters patent, though no counterpart be sealed by the lessee, who is to be charged, *Cro. Jac.* 399; also, if a lease be to A. and B. by indenture, and A. seal a counterpart, and B. agrees to the lease but does not seal, yet B. may be sued for the covenant broken: *Co. Lit.* 231, *a.*; 5 *B. & C.* 599, 602; 8 *D. & R.* 368. When damages are unliquidated, their amount depending on the award of the jury, debt is not applicable, as it only lies for the recovery of money in *numero*, or capable of being reduced to certainty by averment: 2 *M. & S.* 316; 2 *T. R.* 105; *B. N. P.* 167. Covenant is the proper remedy where an entire sum is stipulated by deed to be paid by instalments, the whole not being due, nor being secured by a penalty: 2 *Saund.* 303, *n. c.* Covenant is *usually* a concurrent remedy with debt. Covenant is the proper remedy in cases of money-demands arising from an express or implied covenant in a deed, 13 *East*, 63, 71, 12 *ib.* 182, or where the demand is for rent, or any other liquidated sum: 1 *Saund.* 241, *n. 5.* Although, where there is a deed, the party is seldom allowed to waive his higher remedy and resort to assumpsit, yet there are some exceptions to this rule: thus, if husband and wife separate by deed, and the former covenant with A., her sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance during their separation, and he fails to pay such allowance, A. may support assumpsit for necessities supplied, 2 *N. R.* 148; so, where partners had covenanted under seal to account yearly, and had dissolved partnership and struck a balance, assumpsit was held maintainable on a promise to pay such balance: 2 *T. R.* 479; *Selw. N. P.* 455. It would also seem, that in some cases, where the non-performance of a covenant constitutes a breach of duty, case would be a concurrent remedy with covenant: 2 *W. Bl.* 1111; 5 *B. & C.* 607, 8 *D. & R.* 368.

**PARTIES TO SUIT.**—*Who would be Plaintiffs.*] It is a general principle, that no other than one who is party to the deed can have a right to sue upon it as the right of suit is constituted by the deed: 6 *M. & S.* 77; 3 *B. & B.* 335; 5 *D. & R.* 234. Reference must, therefore, be had to the deed itself, to ascertain the right of the parties.

In general, *all joint covenantees who may sue, must join*; and, even if persons who were parties to a deed, but did not sign or seal the deed, be omitted, it is fatal, no averment of their refusal to execute the deed being made, 3 *B. & C.* 353, 5 *D. & R.* 152; "for, if a covenant be made with three persons, and although two of them did not seal the deed, yet it is not, in law, converted into a covenant with one:" *p. Holroyd, J., ib.* 356; 1 *Saund.* 291, *g.* So, trustees who assent to a trust, and executors who may sue, must join, *ib.* 355; \*and [\*390] where, in covenant against the executors of A., the plt. declared that A. covenanted with him and two others, that his executors, &c., should pay to them an annuity for the use of B., and averred that the other two never sealed the deed, it was held fatal on demurrer, by reason of their not joining, *ib.*, 1 *B. & P.* 67, *Str.* 1146, 1 *Saund.* 291, *g.*; and two covenantees must join, though one has no beneficial interest: 1 *Saund.* 154, *a.* One of two or more joint covenantees, therefore, cannot sue alone; and the omission to join the other parties, or, where one of the parties be dead, the omission to state his death, will be ground of nonsuit at the trial, demurrer on praying over, or in arrest of judgment: 1 *B. & P.* 73; 4 *B. & A.* 374; 2 *T. R.* 282; 1 *Saund.* 154, *a.*, 291, *g.* But, where one of two partners signs a composition-deed in the name of the firm, and sets his seal thereto, he must sue alone, for the other partners, not being parties to the deed, cannot join in covenant: 2 *M. & S.* 76. The right of action follows the interest, in all cases, 1 *Saund. R.* 155, *c.*; therefore, where a deed is *inter partes*, the party who has the legal interest in a covenant, must always sue, although the beneficial interest may be in another, 2 *B. & B.* 333, 2 *M. & S.* 308, 322; and, therefore, where the legal interest is several, each covenantee may bring a separate action for his separate damage, though the words of the covenant are joint only, as it is held that the covenant must follow the interest of the covenantees: *p. Gibbs, C. J., James v. Emery*, 8 *Taunt.* 248: 2 *Moo.* 195, *s. c.* So, where part-owners of a ship agreed, "each and every of them with the others, and each and every of them," that the ship should be under the exclusive direction of one of them, as husband, and that, on her return, an account was to be taken, and the net profits to be divided ratably, it was held, that, as each of the covenantees was entitled to have an account, he might sue the ship's husband without joining the other part-owners: *Owston v. Ogle*, 13 *East*, 538; *Willes*, 154; 1 *Saund.* 151, (1.)

If an agent covenant under seal for the act of another, he renders himself personally liable, as it has been held, 5 *East*, 148, "that one who covenanted for himself, his heirs, executors, &c., for the act of another, was personally bound by his covenant, although he described himself in the deed as covenanting for and on the part and behalf of such other person:" cited by *Abbott, C. J., Burrell v. Jones*, 3 *B. & A.* 50; in which case it was also decided, that the debts, who covenanted in the words, "we, as solicitors to the assigns, &c., undertake to pay," were liable personally: see, also, 1 *B. & C.* 160; *R. & M. C.* 229.

As to where the executor, or heir, or devisee, should sue on a covenant, the rule is, "*that real covenants run with the land*, and either go to the *assignee* of the land, or descend to the *heir*, and must be taken

advantage of by him alone; but *personal covenants* must be made by the executor: *p. Le Blanc*, 1 *M. & S.* 364. On all covenants which run with the land, therefore, the heir or devisee must sue: covenant lies by a devisee of lands in fee upon a covenant made by deft. to the testator, to whom deft. conveyed the lands in fee, that he, deft., *had a good title to convey*, as such covenant runs with the land, and, though broken in the lifetime of testator, is a continuing breach in the time of the devisee, 4 *M. & S.* 53; and the executor could not, in such case, recover, the testator having sustained no damage in his lifetime: 1 *M. & S.* 355. And, where the lessee covenanted with the lessor, his executors, &c., to repair, it was held, the heir (though not named) might have covenant against the lessee for not repairing, 2 *Lev.* 92, *Skin*, 305; and, where the damage was in the lifetime of the ancestor, and continues, the heir may sue and recover what it will cost to put the premises in repair at the time of action brought: *Salk.* 141. But the executor must sue where the ultimate damage was sustained in the time of the ancestor, and, consequently, the covenant running with the land did [\*391] \*not descend to the heir: 2 *Lev.* 26; 1 *Vent.* 75, *s. c.*; see also 5 *Taunt.* 418; 4 *M. & S.* 188; *Fitz. N. B.* 145.

With respect to an assignee, 32 *H.* 8, *c.* 34, gives the assignee (or grantee) of a reversion the same remedies against the lessee or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir, or their ancestor, had at common law. The statute also contains a clause, giving the lessees the same remedy against the grantees of the reversion which they might have had against their grantors, 3 *T. R.* 401; and was passed to remedy the doctrine of the common law, that no person but the parties or privies to a covenant could take advantage thereof; and it has been held, that, under this statute, the assignee of the reversion of part of the demised premises may recover against the lessee for not repairing, 2 *B. & A.* 105; and, therefore, for continuing damage, or other injury, causing a breach after the assignee became legally entitled to the reversion, the assignee must sue: 1 *Saund.* 234, *n.* 4, 241, 6; 2 *Moo.* 164, 171; 3 *M. & S.* 386; 16 *East*, 99; 1 *T. R.* 378; 5 *ib.* 4; 5 *Rep.* 16; 2 *H. B. C.* 319; *Scho. N. P.* 490 to 4, and cases there cited. And "the rule is, that, if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee," *p. Bayley, J. Vernon v. Smith*, 5 *B. & A.* 1; and a covenant to insure against fire, situated within the weekly bills of mortality, mentioned in 14 *G.* 3, *c.* 78, passes, and is a covenant running with the land, that statute enabling the landlord to have the sum insured laid out in rebuilding the premises: *ib.* The remainder-man may sue on a covenant in a lease made by a tenant for life under a leasing power: 3 *M. & S.* 382.

In cases of bankruptcy, an assignment of the legal interest of the bankrupt taking place by operation of law, all the assignees must sue, as in other cases: 1 *Chit. P.* 15; see "*Bankrupt*," "*Insolvent*."

WHO SHOULD BE MADE DEFTS.] Covenant cannot be maintained, except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or has agreed by deed to do

a certain thing, except under some very peculiar circumstances: *p. Abbott, C. J., supra*. When the covenant is joint and several, the plt. may sue one of the covenantees only, though their interest in the subject matter of the covenant be joint; and the words, "for themselves and each of them," have been held to make a joint and separate covenant, 1 *Salk.* 393, 5 *T. R.* 522, 7 *T. R.* 352, 1 *Saund.* 154 (1); but, if three be bound jointly and severally, the plt. cannot sue two of them only, but must sue them all, or each of them separately: 3 *T. R.* 782, 1 *Saund.* 291, *f.* However, the omission to join a covenantor, or one of several covenantors, even when the covenant is joint, is only a cause of abatement, and not of nonsuit, *ib.*, 2 *Taunt.* 254; and it is not error, though it appear on the record that there are others who ought to be joined as defts.; 5 *Rep.* 119; 1 *Str.* 503; 1 *Saund.* 154, *a.*

For breaches of covenant running with the land, *the heir* is liable, *Willes*, 585, *Selw. N. P.* 494, and so is a devisee; if there be several heirs, as in the case of parceners, &c., they should all be joined, or the deft. may plead it in abatement, *Com. D. Abat. E.* 9; and a devisee must be sued jointly with the heir, 2 *Saund.* 7, *n.* 4; but the executor cannot be joined with the heir: *Com. D. F.* 10; *Vin. Ab. Actions, C. d. pl.* 8.

Covenant lies against *executors* in every case, although they be not named, unless it be such a covenant as is to be performed by the person of the testator: 3 *Wils.* 29; *Cro. Eliz.* 553.

*Assignees* are liable, though not named, for the breach of covenants running with the land, and on the privity of estates, 3 *Burr.* 1271; they are, however, chargeable only in respect of the thing demised: as, on \*covenants to repair, 5 *Rep.* 24, *a.*; to reside constantly [\*392] on the demised premises, 2 *H. B.* 133; to leave part of the land demised every year for pasture, *Cro. Jac.* 125; to insure premises against fire under 14 *G.* 3, *c.* 78, 5 *B. & A.* 1, 2 *Chit. Rep.* 608; to supply the demised premises with water, 4 *B. & A.* 266. And the assignee of lessee is liable to a breach of covenant, after the assignment of the estate to him, 2 *Saund.* 304, *n.* 12, though he have never occupied or become possessed in fact, 1 *B. & B.* 238, 3 *Moo.* 500, *s. c.*; but an assignee may always get rid of his liability, by assigning over, which he may do to a mere pauper, although such person neither takes possession nor receives the lease, 1 *B. & P.* 21, *Str.* 1221, 3 *Camp.* 394; see, also, *Selw. N. P.* 496 to 504.

*But, if the covenant be merely collateral or personal, it is otherwise;* for, in order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as, *per se*, and not merely for collateral circumstances, affects the value of the land at the end of the term: *p. Bailey*, 10 *East*, 180; nor is the assignee bound where the covenant relates to personal goods: *Spencer's Case*, 5 *Coke*, 17; *Wilmot*, 345.

*Bankruptcy* does not discharge, *ipso facto*, the bankrupt from his liability to pay rent as lessee, 1 *Saund.* 241, *n.* 5; as the estate does not, by operation of law, vest in the assignees, 1 *B. & A.* 593, 303. Under the new Bankrupt Act, 6 *G.* 4. *c.* 16, *s.* 75, however, he will be discharged, on complying with the provisions therein mentioned. If the



assignees take possession of the estate, they will be liable to the performance of covenants: 7 *East*, 335; 3 *Camp.* 340; *Holt*, C. 290; *Pea. C.* 238; 8 *Tuunt.* 325; 2 *Chit. Rep.* 600; 2 *H. B.* 320; *Archb. B. L.* 127. They may, however, discharge themselves, as in other cases, by assigning their interest over to a pauper: 1 *B. & P.* 21; *ante*, "*Bankrupt.*"

When there is a breach of covenant during coverture, upon a lease made by the wife whilst acting as a *feme sole*, she may be joined with the husband, or he may be sued alone, *Com. D. Bar. & Feme*, Y. 6 *Mod.* 230, 1 *N. R.* 174; but the husband is not liable on a covenant made by the wife during the coverture, unless by his authority: 6 *T. R.* 176; *post*, "*Husband and Wife.*"

### *Form of Pleadings.*

**DECLARATION.]** After stating the time and place of making the contract, and the parties thereto, it must be stated that the same was under seal: 2 *Ld. Raym.* 1536; *Com. Dig. tit. Pleader*, 2 V. 2. A profert of the deed, or some excuse for not making it, should be stated: 3 *T. R.* 151. An inducement is not, in general, necessary in this action, unless by or against a person claiming or being sued in a derivative character, as at the suit of the heir at law, or of the assignee of the lesser: 1 *Chit. Pl.* 311. Nor is a consideration necessary to be stated, unless a conveyance operating under the Statute of Uses be pleaded, *ib.* 315; and an averment, that the debt, "for the consideration in the indenture mentioned," is sufficient: 3 *Bing.* 322. If the plt. state any part of the consideration, he should state the whole: 2 *B. & A.* 765; 1 *Chit. Rep.* 518. The deed declared on may be set out in its very terms, which, in a case admitting of doubtful construction, is safest, 1 *Marsh.* 216, 4 *M. & S.* 13; or according to its legal operation and effect: 1 *Marsh.* 316; 2 *Saund.* 96, b., n. 2. A declaration setting out the *fac-simile* of the deed, will be received so as to make it sense, however incorrect and illiteral the deed may be: 1 *Chit. Pl.* 316. It will suffice in a declaration, though not in a plea, to state, that by the deed "it was witnessed that," &c.; in a plea it should be more positive: 1 *Saund.* 274, n.; 1 *Ld. Raym.* 1539. Where it is stated, that by a certain deed "it was witnessed," &c., there can be no variance, if the very words of the deed are set out: *p. Holroyd, J., Ross v. Parker*, 1 *B. & C.* 362.

[\*393] Care should be taken not to insert any \*unnecessary matter in setting forth the deed, or otherwise, for fear of a variance, or censure from the court. Any exception or condition, or matter qualifying the covenant, should be stated, or an omission would be fatal, on *non est factum*: 11 *East*, 633: see instances, &c., *post*, "*Lease.*" There is some distinction between a proviso and an exception: a proviso is properly the statement of something extrinsic of the subject matter of a covenant, which shall go in discharge of that covenant by way of defeasance; an exception is a taking out of the covenant some part of the subject-matter of it. A plt. need, therefore, never state a proviso: 1 *Saund.* 234. For instances of variances in stating deeds, see *post*, "*Lease.*" &c. The performance of every condition precedent, or an excuse for it, must be averred, as in other actions: *ante*, 121. The

mode of averring performance by a plt. of a condition precedent, and the deft.'s notice thereof, and his breach of covenant, will be found, *ante*, 129. It is usual, after stating the breaches of covenant, to conclude by alleging, "and so the said plt. in fact saith, that the said deft., although often requested so to do, hath not kept his said covenant, but hath broken the same," &c.; but this is mere form, and is superfluous repetition: 1 *Saund.* 235. Damages, being the principal object in this action, 13 *East*, 343, should be laid sufficiently large to cover the real demand. As to damages, *ante*, 169, *post*, "*Damages*."

PLEA.] There is no general issue in an action of covenant, and the deft. must plead specially every matter which it would be necessary to plead in debt on a bond or other specialty: *post*, "*Debt*;" *Com. Dig. tit. Pleader*, 2 *V.* 4, &c. Under the plea of *non est factum*, the deft. may, on the trial, avail himself of a variance in the statement of the deed, either in respect of a misstatement, or of the omission of a covenant qualifying the contract: 9 *East*, 188; 11 *East*, 639; 4 *Camp.* 20; and this, although the deft. has agreed to admit on the trial the due execution of the deed, 1 *Camp.* 70. And, if there be any omission or variance, the deft. may craveoyer, and set out the deed, and demur: *Com. Dig. tit. Pleader*, 2 *V.* 3, 4; 11 *East*, 639; 1 *Chit. Pl.* 370. He should not, in such case, if he wish to avail himself of the defect, set out the deed, and plead *non est factum*, as he could not then do more than dispute the execution: *Snell v. Snell*, 4 *B. & C.* 741, 7 *D. & R.* 294. A plea of *non infregit conventionem* is bad on demurrer, though it would be aided after verdict: 8 *T. R.* 278; 1 *Lev.* 183; 2 *Lev.* 19; 1 *Sid.* 289; *Com. Dig. tit. Pleader*, 2 *V.* 5. *Rien in arrear* is also a bad plea in this action: *Cowp.* 588. The deft. must also plead specially performance of the covenant, *Com. Dig. tit. Pleader*, 2 *V.* 13, *B. N. P.* 165, 1 *B. & P.* 640; or excuse of performance, 1 *Saund.* 204, *n.* 2, 2 *Saund.* 176, 2 *East*, 576, 8 *T. R.* 366, 1 *Saund.* 235; or, admitting the breach to have been committed, the deft. must plead specially that he is discharged, *Com. Dig. tit. Pleader*, 2 *V.* 8: as, by his bankruptcy, &c., 4 *T. R.* 156, 1 *Saund.* 241, *n.* b.; or by accord and satisfaction after breach, 1 *Taunt.* 428; see 8 *Taunt.* 37, 1 *J. B. Moore*, 460, *s. c.*; *ib.*, 358; arbitrament, &c., 9 *Co.* 79, *Com. Dig. tit. Pleader*, 2 *V.* 8. A parol accord and satisfaction, made before breach, cannot be pleaded in bar to an action of covenant, 1 *Taunt.* 428; nor can a parol agreement for a substituted contract be pleaded: 1 *East*, 630; 5 *T. R.* 596. A tender may be pleaded in covenant for the payment of money: 7 *Taunt.* 486; 1 *J. B. Moore*, 200, *s. c.*; 1 *Ld. Raym.* 566.

Replication.] In covenant, as the declaration states the breach, and plea usually denies it, and concludes to the country, a special replication seldom occurs: 1 *Chit. Pl.* 508.

\* *Precedents.*

[\*394]

PRECISE FOR ORIGINAL IN COVENANT.

London, to wit, (venue in action.) Command C. D., late of London, merchant, that justly and without delay, he keep with A. B., the covenant made by him, the said C. D., with the

said A. B., according to the form and effect of a certain indenture (or "*deed-poll*," or "*articles of agreement*," &c., according to the fact); made between them (according to fact), as it is said, and unless, &c. (*As to the præcipe, &c., in general, post, "Præcipe."* It does not disclose the cause of action, which afterwards appears in the declaration. The copies on the præcipe is as follows:) George the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, to the sheriffs of London (according to præcipe) greeting: we command you, that you take C. D., late of, &c., (as in præcipe), if he be found in your bailiwick, and him safely keep, so that you have his body before us on (return-day), wheresoever we shall then be in England, to answer A. B., of a plea, that he keep with him the said A. B., the covenant made by him, the said C. D. (as in præcipe), with the said A. B., according to the form and effect of a certain indenture (as in præcipe) made between them (as in præcipe), as it is said, and have there this writ. Witness, &c.

## DECLARATION THEREON.

In the K. B. (or C. P.)

London, to wit, (venue.) C. D. was summoned to answer A. B., of a plea, that he keep with him the covenant made by the said C. D. with the said A. B., according to the form and effect of a certain indenture (or "*deed-poll*" &c., according to fact) made between them (according to fact); and thereupon the said A. B., by his attorney, complains, for that whereas, &c. (state the deed and breaches, &c., as directed, ante, 392, and conclude thus:) Wherefore the said A. B. saith, that he is injured, and hath sustained damage to the amount of £—, and therefore he brings his suit, &c. (No pledges.)

These are the same as other commencements and conclusions, which will be found, post, "*Declaration*," stating the plea to be "of a breach of covenant."

These are the same as in a declaration by original, as supra.

The statement of the cause of action will be found under the various titles of actions throughout the work.

## PLEA OF NON EST FACTUM.

In the K. B. (or C. P. or Exch.)

— Term, 9 Geo. 4.

C. D. } And the said C. D., by E. F., his attorney, comes and defends the wrong and injury,  
ats. } when, &c., and says, that the said indenture (or "*articles of agreement*," or "*deed-*  
A. B. } *poll*") is not his deed; and of this he, the said C. D., puts himself upon the country, &c.

## PLEA OF PERFORMANCE.

*Actio non, as post, "Plea."*) Because he saith, that he, the said C. D., did, &c. (Here state the performance in the words of the covenant, if such covenant were in the affirmative, and conclude as follows), according to the form and effect of the said indenture (or "*deed-poll*," or "*articles of agreement*"), and of the said covenant of the said C. D., by him in that behalf made as aforesaid, to wit, at, &c. aforesaid; and of this he, the said deft., puts himself upon the country, &c.

See other pleas of "*Payment*," "*License*," "*Accord and Satisfaction*, &c. under those titles.

[\*395]

## \*Evidence.

The plt.'s evidence in this action will depend entirely on the issue taken by the pleadings. See the various titles of actions throughout the work, especially "*Lease*."

On *non est factum* pleaded, the deed must be produced and proved: post, "*Deed*." Payment of money into court admits the execution of the deed: 2 Camp. 356-7; post, "*Payment into Court*." If the deed be not set forth on oyer, and there be any variance between that proved and that stated, it will be fatal under the plea, ante, 393; as to variances, ante, 392, 3; and post, "*Lease*."

## CRIMINAL CONVERSATION.

FORM OF REMEDY, 395.

FORM OF PLEADINGS, *ib.*PRECEDENTS, *ib.*

EVIDENCE FOR PLAINTIFF, 396.

EVIDENCE FOR DEFENDANT, 397.

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*Form of Remedy.*

TRESPASS seems to be the usual and most proper form of remedy by a husband for the seduction of his wife, force being implied, in consequence of the wife not being able to give her consent: *Woodward v. Walton*, 2 N. R. 482; 4 D. & R. 216; *Guy v. Levisay*, Cro. J. 501. Formerly, the usual remedy was case, *Woodward v. Walton*, 2 N. R. 481; and such form of remedy may still be adopted, 5 East, 39, 2 Chit. Pl. 642., and is advisable where the deft. has been guilty of harbouring plt.'s wife.

*Form of Pleadings.*

There is nothing distinguishing the form of the pleadings in this from any other action of trespass or case. It is not necessary to allege or prove that deft. knew the female was plt.'s wife: 2 East, 446. When it may be doubtful whether the criminal conversation can be proved, and the deft. has been guilty of enticing away or harbouring the wife, it may be advisable to add counts for such injuries: see 2 Chit. Pl. 642, n.; *Willes*, 578-9. The plea will in general be the general issue, not guilty.

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*Precedents.*

## DECLARATION AND TRESPASS FOR CRIM. CON. WITH PLT.'S WIFE.

(Commencement as usual, post, "Declaration," "Trespass.") For that the said deft., on, &c. (any day about the time when injury first took place), and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, &c., assaulted and ill-treated E. F., then and still being the wife of the said plt., to wit, at, &c. (*venue*), and then and there debauched and carnally knew her, whereby he, the said plt., for a long space of time, to wit, from the day and year first above mentioned, hitherto hath wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, in his domestic affairs, which he, the said plt., during all the time, ought to have had, and otherwise might and would have had, to wit, at, &c., aforesaid; and other wrongs "to the said plt. then and there did, against the peace of our said Lord the King, and to the damage of the said plt., of £ ; and therefore he brings his suit. Pledges, &c. [\*396]

See form in case, 2 Chit. Pl. 642. See form for enticing away, &c., plt.'s wife, *Willes*, 578, which should be used when there is doubt as to the criminal conversation, and deft. has enticed away or harboured plt.'s wife.

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*Evidence for Plaintiff.*

The plt. must prove his marriage, the criminal conversation, and the damages.

*Proof of Marriage.*] It is necessary that plt. prove his actual marriage, to enable him to recover; this may be done, by the usual production of a copy of the marriage register, *B. N. P.* 247; but the register alone is no evidence of the identity of the parties, which it is also necessary to prove, *Birt v. Barlow*, *Doug.* 162. This is usually proved by some persons present during the ceremony, as the minister, clerk, or subscribing witness to the register; or identity of the parties may be proved by the bell-ringers who rang the bells at the wedding; by persons present at the wedding-dinner; or by a maid-servant, who should prove that her mistress went always by her maiden name till the day of the marriage; that she went out on that day, and, on her return, and ever since, had been called by the name of her husband: *ib.*, and see *Morris v. Miller*, 1 *W. Bl.* 632, *n.*; 4 *Burr.* 2057, *s. c.* The evidence of a person present sufficiently establishes the fact of the marriage, and will supersede the necessity of producing the register, &c.: *Allison's case*, *C. C. R.* 109. Mere proof of cohabitation and general reputation will not be sufficient evidence of marriage: *Morris v. Miller*, 1 *W. Bl.* 632; *B. N. P.* 27; *Leader v. Barry*, 1 *Esp. Rep.* 353. An admission, however, by the deft. that the parties are married, is fit evidence for a jury, as it is for them to decide, whether it was sufficient to substantiate the fact of marriage: *Rigg v. Curvengen*, 2 *Wils.* 399; *Dickenson v. Coward*, 1 *B. & A.* 679; when *Ld. Ellenb.* said, "I take it to be quite clear, that any recognition of a person standing in a given relation to others is *prima-facie* evidence against the person making such recognition, that the relation exists." The marriage will not be rendered invalid by evidence that plt. was not married by his right name, but by his reputed one, *R. v. Inhabitants of Barton-upon-Trent*, 3 *M. & S.* 537; the object of the 26 *G. 2*, c. 39, s. 8, being to secure notoriety to the transaction, by the publication of banns, and to apprise all persons of the intention of the parties to contract marriage; and *p. Ld. Ellenb.*: "how can that object be better attained, than by a publication in the name by which the party is known: *R. v. Billinghamurst*, 3 *M. & S.* 257. But, where party has changed his name, and is married by that name for the purpose of fraud, *Frankland v. Frankland*, cited *ib.*, 259; or deliberately omits parts of his real name, with a view to mislead, *Pougett v. Tomkyns*, cited *ib.* 262; or, where there is no fraudulent intention, but the parties be married by wrong names from mere unthinking levity, *Mather v. Ney*, *ib.*; the marriage, under such circumstances, will be void. But, when a widow assumed her maiden name for several years, and by that name, though with the description of widow, was married to a second husband, it was held, in the absence of fraud, to be a legal marriage: *R. v. St. Faith's, Newton*, 3 *D. & R.* 348. By 26 *G. 2*, c. 33, s. 1, it is incumbent upon the plt. to prove that the banns have been published in a chapel (if the marriage took place under that act) in which it was usual for banns to be published, *R. v. Northfeld*, *Doug.* 658; or he may adduce evidence to found a [\*397] presumption that banns were usually published \*there: *Taunton v. Wyborn*, 2 *Camp.* 297. Marriages solemnized abroad are not affected by the Marriage Act; and that which would be a valid marriage in the place where it was solemnized, is recognized as such in

this country : *Middleton v. Janverin*, 2 Hagg. 437; *Lacon v. Higgins*, 3 Stark. 183. So, the marriage of parties in an English ambassador's chapel is valid : *Rex v. Brampton*. 10 East, 286. Such marriage is, however, further rendered valid by the enactment of 4 G. 4, c. 91. And a marriage in Scotland, according to the law of Scotland, is valid : *Dalrymple v. Dalrymple*, 2 Hagg. 54; *Harford v. Morris*, *ib.* 430. And a marriage in Ireland, by a dissenting minister, in a private room, is good, *Smith v. Maxwell*, R. & M. 80; and so is a marriage by a Catholic priest between British subjects in a British colony : *Lantour v. Teesdale*, 8 Taunt. 833.

*Proof of Criminal Conversation.*] The fact of the adultery must be proved to have been committed, which, though it be frequently difficult to prove, yet, if plt. prove circumstances immediately connected with the fact, it will be deemed sufficient evidence for a jury to decide, 2 Phil. Ev. 202; as a discourse between the wife and the deft., or letters written to her by him, *B. N. P.* 28 a.; and indecent familiarities may be proved to have taken place between them, *D. of Norfolk v. St. Germaines*, 3 St. Tri. 6; the elopement of the parties, and their passing as man and wife, *Stark. Ev.* 440. The confessions of the wife will not, however, be evidence against the deft.: *B. N. P.* 28.

*Proof as to Damages.*] In order to increase the damages, the plt. may show that he and his wife lived on terms of the most cordial affection, which may be proved by persons intimate in the family, *Trelawney v. Coleman*, 1 B. & A. 90; that deft. was admitted as a friend, and took an undue advantage of the confidence reposed in him. "What the husband and wife say to each other, is, beyond all question, evidence to show their demeanour and conduct, whether they were living on better or worse terms: what they write to each other may be liable to suspicion, but, when that is cleared up, the ground of objection fails:" *p. Ld. Ellenb., Trelawney v. Coleman*, 1 B. & A. 91. So, it is necessary that the time when they were written be proved : *Edwards v. Crock*, 4 Esp. Rep. 39; 2 Stark. 191. Proof of a settlement and provision for children may also be given, to enhance the damages : *Bull. N. P.* 27. For the purpose of answering the imputation of connivance on the part of the husband, the plt. may prove representations made by the wife as to the place where she was going previous to her elopement : *Hoare v. Allen*, 3 Esp. Rep. 276. It may also be shown that her character, previous to her acquaintance with deft., was unimpeachable : *Bull. N. P.* 27. But, when evidence of character is admissible, see *ante*, 355.

#### *Evidence for Defendant.*

*Disproof of Marriage.*] This evidence will consist, in most instances, in showing the marriage to have been irregular and void, as by its having taken place in a chapel where no banns were usually published, 4 G. 4, c. 76, s. 22; and, though we have seen a marriage between parties by wrong names will not, in all cases, render it invalid, yet deft. may show a fraudulent intention in assuming wrong names, and thereby invalidate the marriage : *Frankland v. Nicholson*, cited 3 M. & S. 259; *Pougett v. Tomkyns*, *ib.* 364, *supra*.

*Plaintiff's Misconduct.*] Deft. may show the turpitude of the plt. in consenting to the criminal connection with his wife, *Bull. N. P.* 27, *Hodges v. Windham*, *Pea. c.* 53, *Duberley v. Gunning*, 4 T. R. 651; but \*he will not be entitled to adduce evidence of the plt.'s connexion with other women, in bar of the action, but only in mitigation of damages: *Bromley v. Wallace*, 4 *Esp. Rep.* 437.

*Separation of the Parties.*] Where a deed of separation has been entered into between husband and wife, and the wife committed an act of adultery while living separate, though not pursuant to the terms of the deed, the trustees not having given their consent, it was held the husband might maintain an action, as he had not wholly renounced his marital rights: *Chambers v. Caulfield*, 6 *East*, 244. But where an actual separation has taken place, and the criminal conversation occurs after the separation, no action can be maintained by the husband, as he voluntarily parts with that comfort and society for the loss of which he seeks a compensation: *Walden v. Timbrell*, 5 T. R. 357; *Bartelot v. Hawker*, *Pea. Rep. c.* 11. The separation must be with the consent of the husband; or, in the case of trustees, with their consent, and if the wife lived apart without their consent, the husband is still entitled to maintain his action: *Chambers v. Caulfield*, 6 *East*, 248. Where a necessary separation takes place, in consequence of the parties residing in different families or such like, it will be no bar to plt.'s action, as there is no abandonment of his marital rights: *Edwards v. Crock*, 4 *Esp. Rep.* 39.

*Mitigation of Damages.*] To mitigate damages, deft. may show that the wife was a prostitute, though the husband was not privy to it, *Hodges v. Windham*, *Pea. Rep.* 53; he may show letters written by the wife to the deft., whereby to prove that she had solicited and enticed him into the criminal connection, *Elsam v. Fawcett*, 2 *Esp. Rep.* 362, *Schw. N. P.* 25; and evidence of loose conduct and criminality with others, before the cause of action, is admissible, but acts of subsequent misconduct are not, *ib.* He may also show that the husband was in the habit of criminally associating with other women, *Bromley v. Wallace*, 4 *Esp. Rep.* 237; or that the wife had had a bastard before her marriage with the plt. *Bull. N. P.* 296; or he may show the gross neglect and misconduct of the plt., as the turning her out of his house, and refusing her the common necessities of her standing in life: *Bull. N. P.* 296; *Duberley v. Gunning*, 4 T. R. 651. Deft. may also show that his means and expectations are inconsiderable, and not calculated to meet heavy damages: 2 *Stark. Ev.* 445.

*COMPETENCY OF WITNESSES.*] The confessions of the wife are not evidence for the plt. *Bull. N. P.* 28; nor is the wife a competent witness in any case against her husband: *Hale, P. C.* 47.

## CUSTOMS.

*Form of Pleadings relative to, 398.  
Evidence as to, 399.*

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*Form of Pleadings.*

*Declaration.*] As the courts are bound to notice all *general* customs existing by the common law, they need not be stated in pleading: *R. v. Lyme Regis*, *Doug.* 150, *post*, "*Declaration*." Thus, in an action against a common carrier, &c., for the loss of goods, &c., which is a liability founded on the common law or custom of the realm, it is improper to state the custom, as it tends to confound the distinction between general and special customs: *Co. \*Lit.* 89, *a. n.* 7. [\*399] So, it is improper, in a declaration on a bill of exchange, to set out the custom of merchants, because it is part of the law of the land: *Pinkney v. Hall*, 1 *Ld. Raym.* 175. Such of the customs of gavelkind and borough English as are of the essence of the tenure, as the course of descent, need not be specially set out nor prescribed for, as the common law notices them; and it is sufficient to state that the land is of the custom of gavelkind, and subject thereto; but in regard to other customs, though incident to these tenures, they must be set out: *Co. Lit.* 175, *b. n.* 4.

But if the plt. rely on the custom of a particular parish or place, the custom should be stated in the declaration in such a manner as to show the duty thereby chargeable upon the deft.: as, in an action on the case for not keeping a common bull or boar within the parish, the declaration should show the custom: 4 *Mod.* 241; *Mayor of Winton v. Wilkes*, 2 *Ld. Raym.* 1134. A declaration on a local custom ought to set out specially the nature and particulars of the custom; and they ought to be pleaded with precision as to the extent, place, &c., and in the present tense, and not that they should have a way, 2 *Vent.* 144, *And.* 32, *Fost.* 347, 1 *Sid.* 237; and a custom cannot be laid in the negative: 2 *Ld. Raym.* 869. And, in pleading a custom which admits of exceptions, the exceptions must be noticed, *Griffin v. Blandford*, *Cowp.* 62; but modifications of a custom not inconsistent with the right claimed need not be shown: *Ball v. Herbert*, 3 *T. R.* 264. And, where the law raises the exception, it need not be stated in pleading: *Cro. El.* 485. So, where a copyholder under custom claims common, it is not necessary to show what estate they have in the copyhold, *Hoskins v. Robins*, 2 *Saund.* 326; and a custom, though apparently subsequent to another, may be laid as founded time out of mind; for customs are not coeval: *Lovelace's case*, 1 *Salk.* 203.

The courts are not so strict with respect to stating a custom in declarations as in pleas: 4 *Cro. Car.* 347. Care should, however, be taken to state the custom truly, as any material variance between the custom laid and that proved will be fatal. Where a plea of justification for taking two horses as heriots stated a custom in the manor, that the lord, from



time immemorial until the division of a certain tenement into moieties, had taken, and been accustomed to take, a heriot upon the death of every tenant dying seised, and, since the division, the lord had taken and been accustomed to take, on the death of every tenant dying seised with either of the moieties, a heriot for each moiety, it was held that this must be taken to be one entire custom, and not two distinct customs; the one applicable to the tenement before and the other after the division of it; and that, being alleged to be an immemorial custom, it was disproved by evidence that the division was made within memory: *Kingsmill v. Bull*, 9 East, 185. On a justification by the lord of the manor, that the lord should have the best beast on the tenant's death, the custom proved was, that the lord should have the best beast or good, and the variance was held fatal: *Adderly v. Hart*, 1 B. & P. 394.

*Pleas.*] The rules as to stating general and particular customs are the same both in declarations and pleas; but greater strictness is, in general, requisite in pleas than in declarations: 4 Cro. Car. 347.

### *Evidence.*

*General Customs*, being part of the common law, need not be proved.

*Local Customs* must be proved. To establish a particular local custom before a jury, it must be proved that it has existed since the time of legal memory; that is, since the reign of Richard I.: for, if it appear to have originated within time of legal memory, it is not a good [\*400] custom: 1 \*Bl. Com. Intro. s. 3. It is also essential that the usage has been continued; for, if there be any interruption of the right within the time of legal memory, the custom will be void; but an interruption in the possession or enjoyment only, though for ten or twenty years will not destroy the custom. Thus, if the inhabitants of a parish have a customary right of watering their cattle at a certain pond, the custom is not destroyed though they do not use it for ten years; but, if the right be discontinued, though but for a day, the custom is at an end: *ib.* Customs, also, must have been peaceable and acquiesced in, and not subject to contention and dispute in their origin, as they must, in the first instance, have been created by consent. The usual evidence of custom consists in acts of usage within the knowledge and experience of living witnesses, upon which alone, and without the aid of more remote evidence of a documentary or traditional nature, the presumption of a custom may be founded.

As a custom is properly a local usage, applying generally to a place, and concerning public rights (and not, as in the case of prescriptions, to any particular person in it, 2 Bl. Com. 263), common reputation is admitted to be evidence; for such rights, being matter of public notoriety, and of great local importance, become a frequent subject of discussion in the neighbourhood, where all have the same means of information and the same interest to ascertain the claim: *Morewood v. Wood*, 14 East, 329; *ante*, 370. And the same reason applies in a less degree to questions respecting general customs which concern parishes or manors, or the inhabitants of towns and other places. In such cases, general reputation is some evidence of a right beyond the memory of living witnesses, and thus tends to support the modern usage: 1 Phil. Ev. 236.

Concerning questions upon parochial or manorial customs, *Denn v. Spray*, 1 T. R. 466, declarations as to the common opinion of the place, made by deceased persons, who, from their situation, had the means of knowledge, and no interest to misrepresent, have been generally considered admissible evidence. A right of common by custom, though, strictly speaking, a private, is also a general right, as it affects a number of occupiers within a district. But the evidence is to be confined to what such old persons have said as were in a situation to know what the rights were; and, before a customary right can be proved by such evidence, a foundation ought to be laid by showing an exercise of the right or acts of enjoyment within the period of living memory, *Weeks v. Sparke*, 1 M. & S. 689, *Doe v. Lisson*, 12 East, 65, *Morewood v. Wood*, 14 ib. 330; and, though one undisturbed act does not make a custom, it may be evidence of it: *p. Ld. Ellenb., Roe v. Jeffery*, 2 M. & S. 93.

A custom may be destroyed by unity of possession, *Bolus v. Hinstorke*, 1 Ld. Raym. 192, or by showing that it is unreasonable, uncertain, &c.: 1 Bl. Com. 78-9. But a custom is not destroyed by a mere disusage of ten or twenty years: *Carter, R.* 118.



## DAMAGES.

*Statement of, in Declaration, post, "Declaration."*  
*When Recoverable*, 400.  
*Amount of*, 401.

*When Recoverable.*] Damages are a pecuniary compensation for an injury, and may be recovered in every personal action that lies at common law, except in an action by a common informer for a penalty given by statute, 1 Rol. Abr. 574, 4 Burr. 2018, 2489; [\*401] or for delay of execution in a *sci. fa.*, founded on the statute of Westm. 2, c. 45: 3 Burr. 1791. In actions purely real, no damages are recoverable, *Booth on Real Actions*, 74; as in a writ of right, &c.: but damages may be recovered in actions of a mixed nature, as in ejectment, 3 Bl. Com. 200, 201; or in an assize, or writ of entry in nature of an assize of novel disseisin, against the disseisor: 2 Inst. 286. And, by the statute of Gloucester (6 Edward 1), c. 1, damages were given in an assize, or writ of entry.

In most cases, damages are the sole object of the action; in some, merely nominal. In assumpsit, covenant, case, trover, and trespass, damages are the sole object of the suit: in debt, damages are, in general, merely nominal, the recovery of the debt itself being the principal object of the action, 1 H. B. 550, *Cowp.* 588, 6 T. R. 303, 13 East, 342; but, in actions of debt on articles of agreement for a penalty, 2 Wils. 377, or on bond conditioned for the performance of covenant contained in the same, or in any other deed or writing, 2 Burr. 824, 6, and other actions on bonds, where breaches are assessed in pursuance of the 8 and

9 *W.* 3, c. 11; s. 8, see *ante*, 323, *Arch.* 217, the jury first assess nominal damages for the detention of the debt, and then assess actual damages for the breaches assigned: see 1 *Saund.* 58; 2 *Saund.* 187. In *detinue*, the damages are merely nominal, but the jury find the value of the articles detained: *post*, "*Detinue*." In replevin, a verdict for the plt. gives damages precisely as in trespass. If the plt. has evidently sustained some damages, but the jury, being unable to ascertain the amount, find a verdict for the debt., the court will permit the plt. to enter a verdict for nominal damages: *Feize v. Thompson*, 1 *Taunt.* 121.

*Amount of.*] Damages are to be measured by the rank and ability of the party, the nature of the offence, and the circumstances of aggravation or extenuation distinguishing the transaction: *Gilbert v. Berkinshaw*, *Lofft*, 771. Therefore, where a party has undertaken to refrain from an act under a certain penalty, if a stranger commit the act, the measure of damages, in an action against such stranger, should be estimated after the rate of the contractor's penalty: *Caswell v. Coare*, 1 *Taunt.* 566. So, if, by the misfeasance of a party, who is to do a particular act, another party is involved in an action, the injured individual may recover for the breach of contract, together with the costs of the collateral action, as parcel of the damage: *Lewis v. Peat*, 2 *Marsh.* 431.

We have already seen what damages should be given in the case of damages liquidated by agreement between the parties, *ante*, 149; also, what damages are generally recoverable in an action of assumpsit: *ib.* As to the amount of damages recoverable in an action on the case or trespass, see those titles; also, title, "*Seduction*," "*Criminal Conversation*." In general, the jury are at liberty to give what damages they may think proper, proportioned to the degree of injury they may judge the plt. to have sustained from the tort, or breach of contract complained of.

It is a general rule, that the jury cannot take into consideration, in mitigation of damages, any fact or circumstance not pleaded, which could and should have been pleaded as a defence to the action: see 2 *B. & P.* 224; *D. & R. N. P. C.* 10. It is also a general rule, that the jury can in no case exceed the damages laid in the declaration, 2 *W. Bl.* 1300; and it is the duty of the clerk of *nisi prius*, if the jury, by mistake, find a verdict for greater damages, to enter it for the amount laid in the declaration merely: *M. S. M.* 1814; 1 *Arch.* 221. If entered, however, for more, the mistake may be rectified by application to the court, who will allow the plt. to enter a *remittitur* for the excess, 1 *H. Bla.* 643, and see 2 *W. Bl.* 1800; and the court have ordered their judgment to be amended in this respect, even in a subsequent term, *M. S. M.* [\*402] 1814; or the court, in such a case, \*will, if the plt. wish it, grant a new trial, and allow the declaration to be amended: 7 *T. R.* 132.

*Double and treble damages* are given by stat.; and, where a stat. gives double or treble damages, the plt. is entitled to double or treble the sum actually found by the jury, and not to be calculated in the same manner as treble costs, see *Dic.* 420, *Buckle v. Bewes*, 4 *B. & C.* 154; and they may be assessed at any time before judgment, if the jury omit to assess them in their verdict: *Bennet v. Hart*, cited *Sayer on Damages*, 244.

## DEATH.

FORM OF PLEADINGS AS TO, 402.

EVIDENCE AS TO, *ib.**Form of Pleadings in Case of.*

In declaring on a contract by a surviving partner, or otherwise, it is necessary to describe plt. as such survivor, noticing the deceased: 4 *B. & A.* 374; 2 *Saund.* 121, *n.* 1. And, in the case of a deed, if one or more of several obligees or covenantees, who ought, when living, to join, be dead, or did not seal the contract, and refused to do so, that fact should be averred in the declaration, at the suit of the others, or the deft. may craveoyer and demur: *ib.* The omission of the statement of the death in the declaration, in these cases, would be ground of nonsuit, though the plt. should be prepared to prove the death: *Jell v. Douglas*, 4 *B. & A.* 374. In an action at the suit of a surviving partner, he may include a debt not due to him, as survivor: 3 *T. R.* 433; 5 *T. R.* 423; 6 *T. R.* 582.

In declaring *against* a survivor, it is usual, in some counts, to describe him as such, noticing the death of the deceased obligee or partner, 3 *M. & S.* 25, 6 *T. R.* 363; but this is unnecessary, and the survivor may be declared against without noticing the deceased: 1 *B. & A.* 29; 3 *B. & B.* 302; *Comb.* 383. In an action against a survivor, a debt may be included, though not due to him as survivor, 2 *T. R.* 476, 6 *T. R.* 582; and, when the survivor is sued for his own separate debt, he may set off a demand due to him as survivor, 5 *T. R.* 493; 1 *Esp. Rep.* 47.

Where one of several plts. or defts. dies after the issuing of the writ, and before declaration, the commencement should suggest such death: 1 *Burr.* 363: see form, *post.* Where a sole plt. dies, pending the suit, such death may be pleaded in abatement, *Bac. Ab. Abat. F. Co. D.* 32, 33; but, in case of several plts. or defts., the death of one does not abate the suit, if the cause of action survive, for or against the survivors: *ib.*

*Evidence.*

It is incumbent on the party who asserts the death of another, to prove it, as the presumption is, that the party is still living: *Wilson v. Hodges*, 2 *East*, 312. But a presumption of death arises after a lapse of seven years from the time when the person was first known to be living, if no account can be given of the person by his family or connections, who should be called: *Doe v. Jesson*, 6 *East*, 85; *Doe v. Deakin*, 4 *B. & A.* 433; *Paterson v. Black, Park, Ins.* 433; 1 *Bl. R.* 404: Proof by one of a family, that, many years before, a younger brother of the person seized had gone abroad, and that the repute of the family was, that he had died *\*there*, and that the witness had never [\*403] heard, in the family, of his having been married, is presumptive evidence of his death without issue: *Doe v. Griffin*, 15 *East*, 293. And, where a person had sailed on board a vessel, which had not been heard of for two or three years, and was supposed to have perished, in consequence of the ship having encountered, soon after she sailed, some

very strong gales and tempestuous weather, this was contended to be no proof of his death: but *Ld. Ellenb., C. J.*, held, that his death ought, from the circumstances proved, to be presumed; and whether he was alive on a certain day it was for the jury to collect from the evidence: *Watson v. King*, 1 *Stark.* 121.

The best evidence of a party's death is by an examined copy of the register of it, and by proof of the identity: *B. N. P.* 247. But letters of administration, which have been granted to a person as administrator of the effects of A. B., deceased, are not legitimate proof of A. B.'s death: *Thompson v. Donaldson*, 3 *Esp. Rep.* 63. Nor is the register of burials in a Wesleyan chapel admissible as evidence of the death of a party: *Whittuck v. Waters*, 4 *C. & P.* 375.



## DEBT.

NATURE OF REMEDY, AND WHEN IT LIES, 403 to 405.

FORM OF PLEADINGS IN, 405.—*Declaration, ib.*—*Plea*, 406.—*Replication*, 407.

PRECEDENTS, *ib.*

EVIDENCE, 410.

*Nature of Remedy, and when it lies.*

THIS action is for the recovery of a debt *eo nomine et in numero*, and the damages to be recovered in it are, in general, merely nominal. It lies upon a simple contract, a specialty, a record, or a statute, by-law, &c., for the recovery of a sum of money, capable of being reduced, by averments, to a certainty; for, as observed by *Ld. Mansfield*, in *Doug.* 6, "debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought, but is not sustainable in cases of unliquidated damages:" *B. N. P.* 167, (a.)

*On Parol or Simple Contracts, Legal Liabilities, &c.*] Debt is sustainable, as well when the contract is expressed as when it is implied: in *Com. D. (A.)*, it is said,—“Debt lies upon every contract, in deed or in law.” It lies by the payee against the maker of a promissory note, expressing a consideration on the face of it, 2 *B. & P.* 78; but, if there be want of immediate privity between the parties, or if the bill omit to specify the consideration, so as not to raise a debt or duty, an acceptance would operate merely as a collateral engagement, and debt would not lie: 1 *B. & C.* 674; *Schw. N. P.* 542. It also lies for the use and occupation of houses, &c., on a demise not under seal, 5 *Taunt.* 25, 6 *T. R.* 62; also, on the contract, or sale of goods, and on a *quantum valebant*, 2 *T. R.* 30; for fees, *B. Ab. Debt, A., Com. D. Pl. 2 V.* 11; for work and labour, and the *quantum meruit* thereon, *Com. D. Debt, B.* Debt lies on *all contracts* for the payment of money; also, for money lent, had, and received, &c., and on the account stated, *Com. D. Debt, A.*, and for interest, 5 *T. R.* 553, 6; for all duties arising either from

custom or from the common law, *Com. D. Debt*, *A.* 9; on by-laws, 1 *B. & P.* 98; and on judgments not of record, whether English, Irish, or foreign, 1 *Saund.* 92, *n.* 2, 3 *Taunt.* 85, 3 *Bast.* 221, 4 *B. & C.* 411. *Doug.* 1; for fines, tolls, &c., *Com. D. Debt*, *A.* 9. And it would also seem, that, although there were a deed \*between the [\*404] parties, yet, if there were a debt, independent of the deed, the existence of the deed will not prevent the party from recovering that debt, upon the common counts: *p. Bayley, J.*, 4 *B. & C.* 968.

On *Specialties*, debt is also a proper remedy, as on bonds, 1 *T. R.* 40, (see *ante*, "*Bail-bonds*," and "*Bonds*,"), on annuity-deeds, 1 *N. R.* 104, 9; 3 *Bl. Com.* 231; on mortgage-deeds, 1 *Saund.* 276, 282, *n.* 1; on charter-parties, *Str.* 1089; and on policies of insurance under seal: *Marsh. Ins.* 596; 6 *G.* 1, *c.* 18, *s.* 4.

On *Records*, debt also lies, as upon the judgments of courts of record, *Gilb. tit. Debt*, 391, 2 *Salk.* 209, *Com. D. Debt*, *A.* 2; and debt lies on an erroneous judgment, till it is reversed, 1 *Marsh.* 284, 2 *Lev.* 161, 1 *Chit. Pl.* 100; and the deft.'s having been rendered will make no difference, unless the plt. makes his election by charging the deft. in execution, *ib.*, and 6 *Ves.* 446; and, where the deft. has been in execution on the judgment, and discharged with the plt.'s concurrence, debt will not lie on the judgment, 7 *T. R.* 420, 4 *Burr.* 2482, 1 *Chit. Pl.* 100; nor where deft. has been discharged under the Lords' Act. And an action upon a judgment has become less frequent since the 43 *G.* 3, *c.* 46, *s.* 4, precluding the plt. from recovering costs in an action on a judgment, unless the court, or one of the judges, shall otherwise direct: 1 *Chit. Pl.* 100. A judgment obtained in one of the superior courts in Ireland, since the union, is not a record in England, 4 *B. & C.* 411, 414, *a.* Debt does not lie on the decree of a court of equity, founded on equitable considerations only, 3 *B. & A.* 52; but in *Campb.* 253, *Ld. Ellenb.* intimated, that an action might lie on the decree of a colonial court, which has no power to enforce its judgments here; nor on an interlocutory judgment of a court of law, 2 *H. Bl.* 248; 4 *Taunt.* 705. Debt lies on a sheriff's return of *feri feci*, 2 *Saund.* 343, and on a stat. merchant, being under the seal of the party: 2 *Saund.* 69, 70, *n.*

On *Statutes* debt also lies. Where an act casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt: 4 *B. & C.* 967. So, under the 28 *Eliz.* *c.* 4, which says, that the sheriff shall take for his fees no more than 12*d.* for every £20 under £100, and 6*d.* for every £20 above £100, the sheriff may maintain debt for his fees: *ib.* 969. There are cases in which the stat. expressly gives an action of debt: as, the 1 *R.* 2, *c.* 12, for an escape out of execution, 4 *G.* 1, *c.* 28, *s.* 1, against a tenant for double value, for not quitting in pursuance of his landlord's notice; on the 32 *G.* 2, *c.* 28, against sheriffs or gaolers, &c., for extortion; and the 23 *H.* 6, *c.* 29, which gives treble damages: *ib.* 966; see, also, 1 *Saund.* 35, 39, 218; 1 *N. R.* 174. If a stat. prohibits the doing of a thing under a penalty, to be paid to the party grieved, or without saying to whom it shall be paid, and does not prescribe any mode of recovery, debt lies for the party grieved: 1 *M. & Y. R.* 457. But surveyors of highways cannot

maintain debt to recover compensation-money duly assessed, on a stat. giving a remedy by distress, *ib.*; and it would seem, "that, in all cases of debt on stat., the money is given to individuals in respect of what is conceived to be a private injury or right," *ib.* 453; and no action of debt lies for a poor-rate: 2 *Burr.* 1157. Where a stat. gives part of a penalty to a common informer, and enables him to sue by an express provision, debt lies: *Com. D. Debt, E. i. 2*; 2 *East*, 313, 5; *Str.* 828; 2 *Saund.* 374, n. 1, 2; 1 *ib.* 136, n. 1.

Debt does not lie unless the claim be for a sum certain, or for a pecuniary demand which can readily be reduced to a certainty. It does not lie for the recovery of money due by instalments, till all the days are past, 1 *H. Bl.* 554, 2 *Saund.* 303, n. 6, unless the payment [405] be secured by a penalty, *ib.* 550; though debt lies for rent payable half yearly, or otherwise, or for an annuity, or on an agreement to pay a specific sum on one day, and another sum on another: *ib.* *Owen*, 42, *Hunt's case*. Debt does not lie on an oyer, nor on a collateral promise: 1 *Salk.* 23; 2 *B. & P.* 83; 4 *B. & C.* 968. Nor can debt be supported against an executor or administrator upon a simple contract of his intestate, because, as they are presumed to be ignorant of his contract, they cannot wage their law, 1 *N. R.* 293, unless in the exchequer: 1 *Saund.* 68, 216, 286; 2 *Saund.* 74, n. (2). However, if the action be brought against an executor or administrator, he must demur, for it cannot be taken advantage of in arrest of judgment, or upon error: *ib.*; *Flow.* 182.

Wager of law (of which the debt. may avail himself in debt on simple contract) having sunk into disuse, this action is now more adopted than formerly, and is often to be preferred to assumpsit, the judgment being final in the first instance, 3 *Bl. C.* 347, 1 *N. R.* 293, 1 *Saund.* 216, debt on a deed is also in some cases preferable to an action of covenant on it: *ante*, 84.

It is the only remedy against a devisee of land for a breach of covenant by the deviser, 7 *East*, 12, *Chit. Pl.* 102; and, where lessee has been evicted from part of the premises by a third person, for an apportionment of the rent: 2 *East*, 380, 579; 1 *Chit. Pl.* 103.

#### Form of Pleadings.

DECLARATION.] The description of the form of action in the usual commencement may be altogether omitted: 11 *East*, 62. The debt demanded in the commencement is usually the aggregate of all the sums claimed by the declaration to be due; but a mistake in the calculation of such sums is quite immaterial: 11 *East*, 62; 1 *H. Bla.* 249. The plt. may declare in the detinet only, 4 *M. & S.* 125, *Com. D. Pl.* 2 *W.* 8; and this is proper, in an action by or against an executor or administrator, unless, indeed, in an action against an executor on a judgment, suggesting a *devastavit*: *Rol. Ab.* 603; *Bac. Ab. Debt. F.*

If the action be founded on a simple contract, the consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration, as in an action of assumpsit, see *ante*; and it should be stated, the party agreed to pay; stating that he promised to do so would be bad: 2 *T. R.* 28, 30; 3 *B. & A.* 208; 2 *B. & P.* 78. If

the action be founded on a legal liability, the same should be stated, as in *assumpsit*, omitting the *promises*. In declaring on the common counts, it is not necessary to set forth the nature of the debt with more precision than in *assumpsit*: *ante*, 137; 2 *T. R.* 28. The usual conclusion in each count, that "by reason whereof, &c., an action hath accrued," &c., is unnecessary, and the usual breach at the end will suffice: *Gilb. Debt*, 414.

In declaring on a *specialty*, no consideration need be shown, *ante*, 392, unless where the performance of the consideration constitutes a condition precedent, when performance of such consideration should be stated. No inducement is, in general, necessary; when inducement should be stated in debt on lease, &c., see *post*, "*Lease*." The deed itself must be declared on, except in the instance of debt for rent, 1 *N. R.* 104; and in other instances it need not, *ante*, 392; and the omission to set out the deed is mere matter of form, and cured by general demurrer: 4 *B. & C.* 962. It should be stated that the *specialty* was under seal; but, if the words describing it are such as will import it was under seal, it will suffice, as *indenture*, *deed*, or *writing obligatory*: 1 *Saund.* 290, *n.* (1), 320, *n.* 3. If the deft. by his pleading, admit the sealing, an omission to state such sealing will be cured: *ib.*; 1 *Ld. Raym.* 1536. We have already seen, in declaring on a covenant, how to set forth the deed itself; and the rules there stated will apply here: *ante*, 392.

\*It is necessary, in declaring on a deed, when the deed is the foundation of the action, to make a *profert* of it, in order that [\*406] the court may judge of its sufficiency, 10 *Co.* 92, *b.*, 4 *T. R.* 338; it is unnecessary when the deed is stated only as inducement, 8 *T. R.* 573, or where the plt. has no right to the possession of it, or counterpart: 1 *Saund.* 9, *a. n.*, 1. If the instrument be not a *specialty*, a *profert* is necessary: 2 *Saund.* 62, *b. n.*; 5. A deed operating under the Statute of Uses need not be made *profert* of, 8 *T. R.* 573, 1 *Saund.* 9, *n. b.*; nor need a *profert* be made in case of a feoffment: *ib.*; 3 *T. R.* 156. The assignees of a bankrupt obligee need not make a *profert* of the bond, *Cro. Car.* 209; and see other instances when a *profert* is necessary; *Com. D. Plead.* O. 1.

When the instrument cannot be made *profert* of, on account of its being lost, &c., or in deft.'s possession, &c., such fact should be stated, as an excuse for not making *profert*, 3 *T. R.* 151, 2 *H. B.* 259; for, if the plt. profess to produce the instrument when he cannot do so, the deft. is entitled to *oyer*; and, if he plead *non est factum*, the plt. would be nonsuited at the trial: 4 *East*, 585; 1 *Esp. Rep.* 337. The omission of a *profert* can only be taken advantage of by special demurrer: 4 & 5 *Anne*, *c.* 16; *Com. D. Plead.* s. 17. Though a *profert* be made, if it was unnecessary, it will not entitle deft. to *oyer*: 2 *Salk.* 497; 1 *Saund.* 9, *b. n.*, 1; 1 *T. R.* 149.

In declaring on a *record*, the circumstances or consideration on which the record was founded need not be stated: 1 *Chit. Pl.* 320. Unless the record be stated as matter of inducement only, it is necessary to refer to it by the *prout patet per recordum*: *Co. Lit.* 303, *a.*; 1 *Ld. Raym.* 35; 3 *Salk.* 505; *Gilb.* 12; *Willes*, 127; 3 *B. & C.* 2. An omission of this, however, can only be taken advantage of by special



demurrer : 4 & 5 *Anne*, c. 16 ; 11 *East*, 565. As to the mode of framing declarations of recognisances or judgments, see, *post*, those titles.

The mode on framing a declaration on a *statute* will be found, *post*, "*Statute*."

There is nothing peculiar relating to the statement of the breach ; and the usual conclusion, "yet the said deft., although often requested, &c., hath not, &c.:" will, in most cases, suffice. The amount of the *damages* inserted at the conclusion is immaterial.

**PLEA.]** In debt on simple contract or legal liabilities, or for an escape, or on a penal statute, or when a deed is mere inducement to an action, the general issue is *nil debet*, and is, in such cases, the proper plea. The language of this plea puts in issue the existence of the debt at the time of bringing the action ; and, consequently, any matter may be given in evidence under this plea which shows that nothing was due at that time ; as, performance, or a release, or other matter in discharge of the action : 1 *Ld. Raym.* 566. A tender must be pleaded specially, and a set-off must, as in assumpsit, be either pleaded, or notice thereof given : 1 *Chit. Pl.* 422. If the instrument declared on be stated merely as *inducement* to the action, the plea of *nil debet* will suffice, as in an action on a simple contract of legal liability ; and under it deft. may adduce the same kind of proof as he might in the latter form of action : 1 *Chit. Pl.* 423. The plea of *nil debet* is, on the other hand, improper, when the specialty declared on is the foundation of the action, 1 *Saund.* 38, n. 3, 2 *Saund.* 187, 2 ; and plt. should, in such case, demur to such plea : otherwise he will have to prove every allegation in his declaration : and the deft. may avail himself of any ground of defence which he might take advantage of under the plea of *nil debet* in other cases : 5 *Esp. Rep.* 38 ; 2 *Saund.* 187, a.

The plea of *non est factum* is proper when the specialty stated is the foundation of the action, and deft. contends that he did not execute it, or that it is void in law, *Steph. Pl.* 176, or was not duly stamped, &c., 6 *T. R.* 317, or that it varies from the declaration, 11 *East*, 633, 1 *Camp.* 70. *Com. D. Pl.* 2 *W.* 18, 6 *Taunt.* 394, 4 *M. & S.* [\*407] 470, 5 *Moo.* 164, 1 \**Stark.* 294, 2 *D. & R.* 662. It is also a good plea when the plt.'s profert cannot be proved as stated : 4 *East*, 585. If the deed stated in declaration vary from the original, the deft. may take advantage of it, merely by pleading *non est factum*, or may crave *oyer*, set it out, and demur. If he set it out on *oyer* without demurring, he cannot take advantage of a variance on craving *oyer* and setting it out, as the deed becomes part of the declaration : 4 *B. & C.* 741 ; *ante*, 393. The deft. may give in evidence under it that the deed was delivered as an escrow, 4 *Esp. Rep.* 255 ; to a third person, or that it was void at common law, *ab initio*, 2 *Stark.* 35 ; being obtained by fraud, or made by a married woman, 2 *Camp.* 272 ; lunatic, 2 *Str.* 1104, &c. ; or that it became void after it was made, and before the commencement of the action : 5 *Co.* 119. Nor, if he were competent to execute the deed, that he was misled at the time of execution as to its legal effect : *Edwards v. Brown*, 1 *Younge & Serv.* 307. But he cannot give in evidence under it that the deed was voidable : as, by infancy, 2 *Salk.* 675 ; duress, 2 *Inst.* 482-3 ; *per minas*, *ib.*, &c. ; or that it was void by

act of Parliament, 5 Co. 119, *a.*, as by the statutes of usury, 1 Str. 498, or gaming, &c. In these cases, therefore, the debt. must plead specially; so he must plead payment at or after the day of performance, or any matter in excuse of performance; as *non damnificatus* to a bond of indemnity, no award to an arbitration-bond, or, to a bail-bond, no process to arrest the debt.: *Say*. 116, &c. He must also plead specially, in discharge of the action, a tender or set-off; and see, further, the different titles throughout the work.

In debt on *record*, when it is the foundation of the action, *nul tiel record* is the proper plea, where there is either no record at all, or one different from that which the plt. has declared on: 3 *Mod.* 41. But, as this plea only goes to the existence of the record, the debt. must plead payment, or any matter in discharge of the action; and, if an action of debt be brought here on a judgment in Ireland, the plea of *nul tiel record* must conclude to the country: 5 *East*, 473. See further, "*Recognition*," "*Judgment*."

*Nil debet* is the proper plea in debt on a *statute*: 1 *T. R.* 462; *Bac. A. Pleas*, *L. Com. D. Plead.* 2, s. 11, 17. In some cases, the plea of "not guilty" will do: *ib.* The Statute of Limitations may, in such action, be given in evidence under this plea: 2 *Saund.* 63.

REPLICATION.] In debt on simple contract, the replications are similar to those in assumpsit: *post*, "*Replication*." In debt on a specialty, if fraud or duress be pleaded, the plt. may reply that it was duly or freely obtained: *Com. D. Plead.*, 2 *W.* 19, 20. To a plea of usury, gaming, &c., he traverses the illegality of the contract; to a plea of set-off to debt on bond, the replication may either deny the subject matter of the debt's set-off, or allege that more was due on the bond than the sum mentioned: *Symmons v. Knox*, 3 *T. R.* 65. The only replication to a plea of *solvit ad* or *post diem*, is a denial of the payment: *Turner v. Macnamara*, 5 *Mo.* 198; 2 *Chit. Rep.* 697, s. c. As to replications to debt on annuity, *ante*, "*Annuity*." As to replications assigning breaches under 8 and 9 *W.* 3, c. 11, s. 8, *ante*, "*Bond*." To a plea of *nul tiel record*, the replication must state there is such a record; and conclude, *prout palet per recordum*, with a prayer that it may be inspected, &c.: *Com. D. Plead.*, 2 *W.* 13; and see further, *post*, "*Judgment*," "*Recognition*," "*Statute*."

### Precedents.

#### PRÆCIPUE FOR ORIGINAL IN DEBT.

London to wit (*venue in action*). Command C. D., late of ———, merchant (*place of abode and addition*), that, justly and without delay, he render unto A. B. the sum of £——, (*the amount to be claimed in declaration*), of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said; and unless, &c. (*As to the præcipe in general, see post*, "*Præcipe*." *It does not disclose the cause of action, which afterwards appears in the declaration. The capias on the præcipe is as follows:*) [\*408] George the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, to the sheriffs of London, greeting. We command you that you take C. D., late of ———, in your county, merchant (*as in præcipe*), if he be found in your bailiwick, and him safely keep, so that you may have his body before us (or, if in C. P., "before our justices of the bench at Westr."), on ———, wheresoever we shall then be in England, to answer A. B. of a plea, that he render to the said A. B. the sum of £—— (*as in præcipe*), of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said, and have there this writ. Witness, &c.

## DECLARATION THEREON.

In the K. B. (or C. P.)

Term, 9 Geo. 4.

London to wit (*venue*). C. D. was summoned to answer A. B. of a plea, that he render unto the said A. B. the sum of £— (*aggregate amount of all the sums claimed in declaration, ante, 406*), of good and lawful money of Great Britain, which he owes to and unjustly detains from him; and therefore the said A. B., by —, his attorney, complains, for that whereas, &c. (*State the bond, or other debt, or cause of action, fully, for which see the various titles of actions throughout the work, and conclude as follows:*) Whereupon the said A. B. saith, that he is injured, and hath sustained damage to the amount of £— (*nominal, ante, 406*); and therefore he brings his suit, &c. (*Omit pledges.*)

## COMMENCEMENT AND CONCLUSION OF DECLARATION IN DEBT IN K. B. BY BILL.

In the K. B. (or C. P.)

—, 9 Geo. 4.

(*Venue*) (to wit), A. B. complains of C. D. being, &c. (*as usual in K. B., post, "Declaration,"*) of a plea that he render to the said A. B. the sum of £—, of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas, &c. (*Conclude as usual in K. B., post, "Declaration."*)

## THE LIKE IN C. P.

In the C. P.

Term, 9 Geo. 4.

(*Venue*) (to wit), C. D. was summoned to answer A. B. of a plea, that he render to him the sum of £—, of lawful money of Great Britain, which he owes to and unjustly detains from him; and thereupon the said A. B., by —, his attorney, complains, for that whereas, &c. (*Conclude as usual in C. P., post, "Declaration."*)

## THE LIKE IN DEBT, QUI TAM, IN K. B.

In the K. B.

(*Venue*) (to wit), A. B., who sues as well for our sovereign lord the king (*or, "for the poor of the parish of —, in the county of —,"*) as for himself in this behalf, complains of C. D., being in the custody, &c., of a plea, that he render to our said lord the king (*or, "to the poor of the aforesaid parish,"*) and to the said A. B., who sues as aforesaid, the sum of £—, of lawful money of Great Britain, which he owes to and unjustly detains from them, for that whereas, &c. (*See post, "Statutes."*) And therefore, as well for our said lord the king (*or, "for the poor of the parish of —,"*) as for himself in this behalf, he brings his suit, &c. Pledges, &c.

## THE LIKE IN DEBT QUI TAM, IN C. P.

In the C. P.

Term, 9 Geo. 4.

(*Venue*) (to wit), C. D. was summoned to answer A. B., who sues as well for our sovereign lord the king (*or, "for the poor of the parish of —, in the county of —,"*) as for himself in this behalf, of a plea, that he render to our said lord the king (*or, "to the poor of the said parish,"*) and to the said A. B., who sues as aforesaid, the sum of £—, of lawful money of Great Britain, which he owes to and unjustly detains from him; and thereupon the said A. B., by —, his attorney, complains, for that whereas, &c. (*See post, "Statute."*) Wherefore, as well for our said lord the king (*or, "for the poor of the parish of —,"*) as for himself in this behalf, he brings his suit, &c.

## INDEBITATUS COUNT, IN DEBT.

For that whereas (*or, if this be not the first count, say, "and whereas also"*) the said debt, heretofore, to wit, on the — day of —, A. D. — (*or, if a day has been already mentioned, say, "afterwards, to wit, on the "day and year aforesaid" at (venue),*) was indebted to the said plt. in the sum of £—, of lawful money of Great Britain (*or, "like lawful money"*) for (*here state the subject-matter of the debt, as in assumpsit—see the various forms under the different titles of actions throughout the work*), and at his special instance and request, and to be paid by the said debt. to the said plt., when he, the said debt., should be thereunto afterwards requested. Whereby, and by reason of the said (*or, "said last-mentioned"*) sum of money being and remaining wholly unpaid, an action hath accrued to the said plt., to demand and have of and from the said debt., the said last-mentioned sum of £—, parcel (*or, "other parcel"*) of the said sum above demanded.

## QUANTUM MERUIT THEREON.

And whereas, also, afterwards, to wit, on the day and year (last) aforesaid, at (*venue*) aforesaid, was indebted to the said plt. in the sum of £—, of like lawful money, for (*state the subject-matter of the quantum meruit, as in assumpsit, and see the various titles of actions*

throughout the work. It is questionable whether the quantum meruit count is tenable in an action of debt; and in case of a judgment by default, it would require an inquiry to be executed he, the said deft., undertook, and then and there agreed to pay to the said plt. so much money as he therefore reasonably deserved to have of the said deft., when he, the said deft. should be thereunto afterwards requested. And the said plt. avers, that he therefore reasonably deserved to have of the said deft. the further sum of £—, of like lawful money, to wit, at (venue) aforesaid, whereof the said deft. afterwards, to wit, on the day and year (last) aforesaid, there had notice, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plt. to demand and have of and from the said deft. the said last-mentioned sum of £—, other parcel of the said sum above demanded.

See the various descriptions of debt under the titles of actions throughout the work. The common counts for money lent, &c., and account stated, will be found under those titles.

## PLEA OF NIL DEBET.

In the K. B. (or C. P.)

— Term, 9 Geo. 4.

C. D. } And the said deft., by —, his attorney, comes and defends the wrong and in-  
ats. } jury, when, &c., and says, that he does not owe the said sum of money (or the said  
A. B. } sum of £—) above demanded, or any part thereof, in manner and form as the said  
plt. hath above thereof complained against him; and of this he, the said deft., puts himself  
upon the country, &c.

## PLEA OF NIL DEBET IN QUI TAM.

In the K. B. (or C. P., or Excq.)

— Term, 9 Geo. 4.

C. D. } And the said deft., by —, his attorney, comes and defends the wrong and in-  
ats. } jury, when, &c., and says, that he does not owe to our said lord the king (or "to the  
A. B. } poor of the parish of —, in the county aforesaid") and to the said plt. who sues as  
aforesaid, or to either of them, the said sum of money (or "the said sum of £—") above de-  
manded, or any part thereof, in manner and form as the said plt., who sues as aforesaid,  
hath above thereof complained against him; and of this he puts himself upon the country,  
&c.

## NON EST FACTUM.

In the K. B. (or C. P.)

— Term, 9 Geo. 4.

C. D. } And the said deft. by —, his attorney, comes and defends the wrong and in-  
ats. } jury, when, &c., and says, that the said supposed writing obligatory (or "indenture,"  
A. B. } or "articles of agreement") is not his deed, and of this he puts himself upon the coun-  
try, &c.

## NON EST FACTUM, CRAVING OYER OF THE BOND AND CONDITION.

C. D. } And the said deft. by E. F., his attorney, comes and defends the wrong and in-  
ats. } jury, when, &c., and craves oyer of the said supposed writing obligatory, in the said  
A. B. } declaration mentioned, and it is read to him, &c.; he also craves oyer of the condi-  
tion of the said supposed writing obligatory, and it is read to him in these words: whereas,  
&c. (here set forth the condition, with the recitals, if any, verbatim,) which  
\*being read and heard, the said deft. says that the said supposed writing obliga- [\*410]  
tory is not his deed; and of this he puts himself upon the country, &c.

## COMMENCEMENT OF PLEA OF ONERARI NON.

C. D. } And the said deft., by —, his attorney, comes and defends the wrong and in-  
ats. } jury, when, &c., and says, that he ought not to be charged with the said debt, by vir-  
A. B. } tue of the said supposed writing obligatory (or "indenture," according to declaration,) because he says, (here insert the subject-matter of the plea, which will be found under the various titles of defences throughout the work;) and this the said deft. is ready to verify: wherefore he prays judgment, if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory (or "indenture," according to fact,) &c.  
Replications.] These will be found under "Replication," and the various titles of defences throughout the work.

## Evidence.

Debt on simple contract, in respect to the evidence, differs nothing from the action of assumpsit; and the rules for settling the evidence un-

der that head will here apply, *ante*, "*Assumpsit*," and the titles of different actions in the work. As to the general evidence in debt on bond or deeds, see "*Bond*," "*Deed*." For the evidence under different defences, see the various titles of defences in the work.



## DECLARATION.

*Nature and Form of, in general, 410.—Title of Court, ib.—Title of Term, 411.—The Venue, 412.—Names of Parties, 414.—Mode in which Deft. brought into Court, ib.—Recital of Cause of Action, 415.—Exposition of Cause of Action, ib.—Several Counts, 417.—The Conclusion, 418.*  
*Precedents of Covenants, and Conclusions of Declarations, 419.*

### *Nature and Form of.*

THE declaration in pleading is a statement in legal form by the plt. of his cause of complaint against deft. It would be extending this work beyond its intended limits, to enter into a detail of all the general requisites of a declaration; these will be found ably collected in 1 *Chit. Pl.* 222 to 233. The particular parts to be attended to are the title of the court and term; hence, the names of the parties, the mode in which deft. was brought into court, the recital of the cause of action, the exposition of such cause of action, and lastly, the conclusion; and which points we shall consider in the above order.

\* *Title of Court.*] The name of the court in which the [\*411] action is brought should regularly be stated. In the King's Bench, when the proceedings are by original, and in the Common Pleas and Exchequer, the name of the court is mentioned in the declaration, as, "In the King's Bench," "In the C. P." &c. In the King's Bench, when the proceedings are by bill, the declaration is entitled with the name of the prothonotary, or chief clerk, for enrolling pleas in civil causes between party and party, and particularly by bill.

*Title of Term.*] In general, the declaration should be entitled of the term in which the writ is returnable, *Smith v. Muller*, 3 *T. R.* 624; but, if the plt. do not declare until after the deft. has appeared, it may be entitled of the term of such appearance; and, if not entitled on either of these terms, it is irregular, and subsequent proceedings thereon, on a judgment by default, may be set aside: *Topping v. Fage*, 1 *Marsh.* 341; 3 *T. R.* 624. And, when the party is held to bail, the declaration filed absolutely should not be entitled on a day previous to that of filing and putting in bail: 8 *T. R.* 458; *Tidd*, 428. Where there are more defts. than one, and one of them cannot be served or arrested on the first process, and he be served with an *alias* returnable in a subsequent term, the declaration should be entitled of such term: 3 *T. R.* 627; *Tidd*, 428; 1 *Bing.* 48. And, where one of several defts. has been outlawed, the declaration must be entitled after such outlawing is complete;

1 *East*, 133. In K. B., by bill, a declaration, by the by, may be entitled of the second term after the process was returnable: 3 *T. R.* 627. In proceeding by bill against an attorney, the marshal, warden, or a prisoner, in vacation, on a cause of action accruing in such vacation, the bill must be entitled of the preceding term, and prefaced with a special memorandum, showing the actual time of filing the bill: 2 *Saund.* 1, n. 1. A bill filed against either of such parties, between the essoign and first day of a term, may be entitled of that term: 4 *Moo.* 425; 2 *B. & B.* 51, s. c.

When the cause of action occurred on or before the first day of the term, the declaration may be entitled generally of the term, 1 *T. R.* 116, 3 *Stark.* 138; but, if the cause of action accrued, or the plt. wishes to avail himself of some promise or acknowledgment made, or tort committed, subsequently to that day, the declaration should be entitled specially of the day of filing or delivering it: thus, "Wednesday next after fifteen days of Easter, or on some other certain day in term after the cause of action accrued, *ib.*, 1 *Saund.* 40, n., 2 *ib.*, 171, c.; otherwise, the plt. would be nonsuited, or precluded from showing such promise, acknowledgment, or tort, at the trial, if he did not show the real day of filing or delivering the declaration, by the issuing of the writ or otherwise: 2 *Saund.* 1, n.; 1 *Burr.* 1241; 1 *W. Bl. R.* 312; *B. N. P.* 137; 5 *B. & C.* 152. A special memorandum is also frequently advisable, in order to avoid the necessity of proving the suit (see "*Process*"), as where the time limited for bringing the action does not expire till after the first day of the term: 2 *Saund.* 1, c. d.; 2 *East*, 574; 1 *B. & P.* 263; *ante*, "*Attorney*." But this special memorandum is not necessary, if the declaration be on or state some proceeding of record, referring the filing of the declaration to some subsequent day of the term, as in a declaration on a *sci. fa.*: 2 *W. Bl. R.* 735; 3 *Wils.* 154; see 2 *Lev.* 13, 176; 1 *Vent.* 264. In a declaration in ejectment, the declaration should be entitled of the preceding term to that in which deft. is to appear to it, and this though the declaration be laid on a day subsequent to such term: *Run. Eject.* 208-9, 217. Where a cause of action arose on the 29th Jan., being the first day of the fourth year of the reign of George the Fourth, and the declaration was entitled, "Saturday next after fifteen days of St. Hilary, in H. T., 3 G. 4," which would be the 1st Feb. in the fourth year of the reign, the court held the title sufficient, even on special demurrer: 2 *D. & R.* 868.

If the declaration be entitled generally of the term, and it appear upon the face of it that the cause of action accrued subsequently to that day, the deft. may demur specially: *Pugh v. Robinson*, 1 *T. R.* 116; 1 *Str.* 21. But the objection appears to be cured by verdict, and a judgment cannot (at all events, if proper steps be taken by plt.) be arrested for it: 1 *Chit. Pl.* 237; *Andr.* 13, 250; *Cro. E.* 325; *Cro. C.* 272, 282; *Carth.* 113; *B. N. P.* 137; *Tidd*, 428. It is no period for bringing a writ of error, 1 *M. & Y.* 202, 2 *Bing.* 469, s. c.; and this, though the action was \*in an inferior court: 3 *B. & A.* 605; 1 *Wils.* 180. By statute [\*412] 39 and 40 G. 3, c. 105, an objection of this nature is aided in the C. P. at Lancaster. The objection may be cured by a plea, confessing and avoiding the cause of action, as a plea of *son assault demesne*: 2

*Str.* 1271. If the objection do not appear on the face of the pleadings, the plt. would be nonsuited at the trial, if he did not prove the declaration was filed or delivered before the cause of action accrued, *supra*; or if, in fact, the cause of action, in an action in K. B. by bill, accrued after the filing or delivery of declaration, or after the issuing the writ, in proceedings by original or in C. P., the deft. might plead that fact in abatement, *Com. D. Abatement*, G. 6, or plt. would be nonsuited: 2 *Saund.* 1, n. 1; *Burr.* 1241; 1 *Bl. R.* 312. The plt. may, at all times, amend, *Tidd*, 428, 1 *Wils.* 78, 7 *T. R.* 474, except, perhaps, in a penal action: 6 *Taunt.* 19; 1 *Marsh.* 419, *s. c.* Where the declaration is entitled generally of the term, or of a day before it was actually filed or delivered, so that thereby deft. may be put to some trouble or prejudice, the court will order plt. to entitle it of the day of such filing or delivery: *Tidd*, 428; 1 *Chit. Pl.* 239. As, where the declaration is entitled of the term generally, and the deft. pleads *plene administravit*, *C. T. Hardw.* 141, or a tender made before the exhibiting the declaration, upon which he would give in evidence a tender made between the first day of the term, to which the declaration relates, and the day of suing out the writ, he has a right to call on the plt. to entitle his declaration specially: 1 *Wils.* 39, 304; 1 *Str.* 638, *s. c.* Deft., however, may always, for the purposes of his defence or otherwise, plead, or show in evidence at the trial, 3 *Burr.* 1241, 4 *Esp. Rep.* 72, when in fact the declaration was filed or delivered, as, by proving the writ, or the like, 5 *B. & C.* 149, *Tidd*, 428; see "*Process*," the title of the declaration being mere *prima-facie* evidence of the day of the filing or delivery of it: *ib.*

*Venue.*] After the statement of the title of the court and term, follow the statement of the venue, which is inserted, first in the margin, and afterwards in the body part, of the declaration. With respect to what venue should be stated, it should be the county wherein the trial of the action will take place.

Some actions are transitory, others local. Where the cause of action might have arisen in *any* county, the venue is *transitory*, and the action may be brought in *any* county; therefore, actions on *contracts*, as on a covenant between the original parties and their covenantors to it, debt or assumpsit, for use and occupation, on bail bonds, bills, and all other such contracts, detinue, &c., 5 *Taunt.* 29, *Co. D. N.* 12, 1 *Saund.* 74, 241, *b.*, *Fort.* 366, *Str.* 727, or for *injuries ex delicto* to the person or personal property, as assaults, batteries, false imprisonment, *Cowp.* 161, slander, libel, 1 *T. R.* 571, trover, *Co. D. Action*, *N.* 12, escapes, &c., 1 *Wils.* 336, are transitory, and may be laid in *any* county. And it makes no difference whether such contract were entered into, *Com. D. Action*, *N.* 12, 1 *Saund.* 74, 241, *b.*, *Cowp.* 180, or such tort committed, out of the kingdom, *Cowp.* 161, *Com. D. Action*, *N.* 12, *W. Bl. R.* 1058, or jurisdiction of the king's courts, *ib.*; and this, though the action be against a member of Parliament: 4 *East*, 162.

The venue is *local*, and must be laid in the county where the cause of action accrued, when such cause of action could only have arisen in a *particular* county; such as action for injury to *real* property, actions of ejectment, and all real and mixed actions: therefore, an action of

trespass to real property, or case for a nuisance to it, 1 *Taunt.* 379, must be brought in the county where the property is situate. So must an action for waste, or injury to a watercourse, right of common, way, &c., *ib.* And, if an injury be committed to land out of the jurisdiction of our courts, or out of the kingdom, the plt. has no remedy here, if there \*be a court of justice to resort to where the land is [\*413] situate : 4 *T. R.* 503 ; 1 *Str.* 646. The venue is local in replevin : 1 *Saund.* 347, n. 1. Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts which took place in different counties, the venue may be laid in either : 2 *Taunt.* 252 ; 2 *T. R.* 238. If there be a contract independent of the tort, whereon the plt. may found his action and bill, the action thereon is transitory, see 1 *Taunt.* 379, and the parties may, by the leave of the court, try a local action in another county, such consent appearing on the record : *Co. Lit.* 1256, 126, a. n. 1, in *T. R.* 372.

In an action upon a lease, for rent, not repairing, &c., when the action is founded on the privity of *estate*, and not upon the privity of *contract*, it is local, and the action must be brought in the county where the estate lies, 1 *Saund.* 241, b. (6) ; as, if the action be against the executor of the lessee, *as assignee* upon the privity of estate, it is local, 2 *Lev.* 80 ; so in *debt*, by the assignee, *Cro. C.* 183, 1 *Wils.* 165, or devisee, *W. Jon.* 43, of the lessor against the lessee, which is founded on the privity of estate, the action is local. So, in debt or covenant by the lessor, 6 *Mod.* 194, or his personal representatives, *Latch.* 197, or by the grantee of the reversion, *Carth.* 182, 3 *Mod.* 336, 7 *T. R.* 583, against the assignee of the lessee, the venue is local. See further, as to the venue in actions on leases, *post*, "*Lease.*"

An action for breach of a custom or by-law is local ; but an action of debt on a charter is not : 2 *Bl.* 1068. Debt for a copyhold fine is local : *Entr.* 177 ; 1 *Chit. Pl.* 243. Debt for arrears of a rent-charge against the pignor of the profits, is local : *Hob.* 37.

In an action on a record, the venue is local and must be laid in the county where the record is : *post*, "*Recognisance,*" "*Judgment.*"

In all actions on penal *statutes*, the same is local, 31 *Eliz. c.* 5, s. 2, 21 *Jac.* 1, c. 4. s. 2, 3 *M. & S.* 429 : 5 *M. & S.* 427 ; but, in actions on statute by the party grieved, it is not so : 1 *Show.* 354 ; *B. N. P.* 196. The venue, in an action on a penal statute, should be laid in the county where the offence was completed : *Pearson v. M'Gouran*, 3 *B. & C.*, 700 ; 5 *D. & R.* 616 ; *post*, "*Statute.*"

By various statutes, the venues in actions against particular persons, are made local, as in actions against justices, constables, &c., and other public officers : see, "*Officer,*" "*Justice.*"

A venue should be laid to every *material traversable* fact : *R. T. H.* 288 ; 14 *East*, 291, 306 ; 3 *M. & S.* 149 ; *Com. D. Plead.*, C. 20. It is unnecessary to lay it to matter of inducement, when not traversable, and which cannot be tried, *ib. Plowd.* 191 ; nor is it necessary so to do to a mere negative allegation : 5 *T. R.* 616 ; 1 *Taunt.* 379.

With respect to the mode of stating the venue, it is first stated in the margin of the declaration, after the title of court and term. Though a



wrong county be here stated, it will not be objectionable if a right one appear in the body of the declaration; and, on the other hand, if a right county be here stated, it will help a wrong one, stated in the body: 1 *Taunt.* 379; 1 *Saund.* 308, n. 1. Where no local description is necessary, as in replevin, &c. though usual, it is not necessary to aver that the fact took place in any particular parish or place within the county; it suffices to allege it took place in the county only: 3 *M. & S.* 148; *Co. Lit.* 125, b. As to describing the venue in penal actions, see *post*, "Statute." Even in local actions, unless in replevin, no precise local description is necessary: 2 *East*, 503. When a transitory matter has occurred abroad, it may be stated to have taken place here; though, in some cases, for the purpose of explaining a fact, it may be necessary to state it occurred abroad: *Cowp.* 170; 10 *Mod.* 255; 1 *Chit. Pl.* 241, 250; 2 *B. & A.* 301; 1 *B. & C.* 16. A variance in the proof as to the parish or place stated as *venue* is, in general, immaterial, 2 *East*, 503; but, if the parish or place be stated as matter of *description*, as, in the situation of premises, &c., \*then a variance would be fatal: 1 *Esp. Rep.* 273; 2 *B. & P.* 281; *ante*, 413; and see "*Ejectment*," "*Trespass*." Describing premises as situated "at or near" a place, does not require strict proof: *Pea. L. E.* 199; 4 *T. R.* 558, 561. In an action on a penal statute, where a part of a penalty is given to the poor of the parish, the name of such parish is matter of substance, and the offence must be necessarily laid and proved to have taken place therein: 2 *East*, 503; 3 *Esp. Rep.* 319; 4 *Bing.* 449; 7 *B. & C.* 111. In actions in inferior courts in general, except the courts of the counties palatine, and a few others, it is necessary to aver that every *material fact* took place within the jurisdiction of the court; and an omission of such averment will render the declaration bad, even after verdict, 1 *Saund.* 74, n. (h), 1 *T. R.* 151, 6 *T. R.* 764, 2 *Str.* 827, 3 *B. & B.* 309; but, to averments of facts which are stated only in aggravation of damages, and which might be omitted, this is not necessary: *ib.* In assumpsit for work and labour in healing horses within the jurisdiction of a county court, and for potions, &c., administered *on those occasions*, it was held that this amounted to a sufficient averment that the potions were administered within the jurisdiction: 3 *B. & B.* 309.

With respect to the mode of taking advantage of a defect in stating the venue, if the action be *local*, and the venue be laid in a wrong county, and which appears in the pleadings, the deft. may demur, 1 *Saund.* 241, c., *Carth.* 182, 1 *Wils.* 165; or, if it does not so appear, it will be a ground of nonsuit under the general issue, 7 *T. R.* 588; 2 *East*, 580, 1 *Saund.* 347, n. 1. But it affords no ground for writ of error: 16 & 17 *Car.* 2, c. 8; 4 *Anne*, c. 16, s. 2; 4 *G.* 2, c. 26; 1 *Saund.* 347, n. 3; 7 *T. R.* 583. If a local description or venue, when necessary, be *omitted*, it is not matter of nonsuit, but of demurrer or arrest of judgment: 2 *East*, 499; 2 *Wils.* 354. A mere formal defect in stating the venue is aided by pleading over, 2 *Ld. Raym.* 1039, *Dyer*, 15, a., and can only be objected to by special demurrer: 3 *T. R.* 387. In actions in inferior courts, as we have seen, the omission in stating a material fact to have accrued within the jurisdiction is bad, even after verdict or judgment:

*supra*. A variance in description of local situation of property is sometimes fatal: *ante*, 413; *post*, "*Trespass*," "*Ejectment*."

*Names of Parties in Commencement of Declaration.*] The names of the parties, should, in general, be set forth as they appear in the process. If, however, there be a misnomer in the process, the mistake should be rectified by declaring in the right name, and stating that plt. sued, or deft. was sued, by the wrong one, 3 *East*, 187, see form, *post*; otherwise, if the misnomer be carried into the declaration, deft. might plead in abatement, *ante*, 10, but he could not take any other advantage. The deft.'s addition need not be stated: 3 *B. & P.* 395; *Com. D. Plead. C.* 9. If plt. sues, or deft. is sued, in any particular character, he should be described accordingly, though, perhaps, the omission would be cured by the body-part of the declaration stating it.

*Statement of Mode in which Defendant has been brought into Court.*] If the action be by bill in K. B. against a common person, the declaration usually begins by stating deft. to be in the custody of the marshal; or, if he be in custody of the sheriff, or bailiff, or steward of a franchise, having the return and execution of writs, it should allege in whose custody he is at the time of the declaration, by virtue of the process of the court at the suit of the plts., 4 & 5 *W. & M. c.* 21, s. 3, *Tidd*, 8 *ed.* 342, 1 *T. R.* 342; and if, in the latter case, it is not so alleged, deft. may get discharged out of custody, or may be demurred generally: 1 *Wils.* 119; 2 *Ld. Raym.* 1362.

In actions against attorneys, instead of stating them to be in the custody of the marshal or the sheriff, it should be stated that they are present \*in court; or, in actions against peers or members [\*415] of Parliament, that they have privilege of Parliament. In proceedings against attorneys, officers of the court, or prisoners in vacation, in a cause accruing in such vacation, a special memorandum of the filing of the bill is necessary: see *Tidd*, 434; 1 *Chit. Pl.* 234. As to describing the plt.'s or deft.'s representative character, in actions relative thereto, see "*Bankrupt*," "*Executors*," "*Partners*," Infants are stated to sue by guardian or *prochein amy*: 2 *Saund.* 117, *f. n.* 1. Where one of several plts. or defts. dies, after issuing the writ, and before declaration, the commencement should suggest the death: 8 & 9 *W.* 3, c. 11, s. 7; 1 *Burr.* 363. Where one of several defts. has been outlawed, upon an original writ in either of the courts, the declaration should, in the commencement, state the outlawry in the particular suit: 3 *East*, 144; 1 *Wils.* 78; 1 *East*, 133.

In account, covenant, debt, annuity, detinue, and replevin, where the original is a summons, the declaration, by original writ in K. B. or C. P., begins by stating, that deft. was *summoned* to answer; in actions on the case, trespass, ejectment, &c., where the original is an attachment, it states, that he was *attached* to answer, *Com. D. Pleader, c.* 12, 2 *Saund.* 1, *n.*, 1 *Tidd*, 435; a mistake, however, in this, does not appear material: see 1 *Chit. Pl.* 256, 7. It would, however, be bad to begin with a *queritur*, as in K. B. by bill: *Com. D. Pleader, C.* 11. In actions by original, and in C. P., it is stated, plt. complains by his attorney; stating he complained by more than one attorney would be bad: 4 *East*;

195. An omission in stating plt. complains by his attorney is immaterial: 1 *B. & P.* 366.

*Recital of Cause of Action.*] It is now no longer necessary, in proceedings by original, to recite the whole of the original writ, *Tidd*, 435; 1 *Chit. Pl.* 257; nor is it necessary in the Court of C. P., in an action of trespass, to recite the trespass, *ib.*, though it is usual shortly to state what the plea is, as in "a plea of trespass on the case upon premises," &c., or the like. This is, nevertheless, immaterial, for the body of the declaration shows the nature of the plea: 11 *East*, 65; *Plead. Ass.* 292.

*Statement of Cause of Action.*] The mode of stating the cause of action, in particular actions, will be found under the various titles of actions throughout the work: see "*Assumpsit*," "*Debt*," "*Covenant*," "*Detinue*," "*Case*," "*Trover*," "*Replevin*," "*Trespass*," &c. The following is a summary of the general rule applicable to the statement of the cause of action, and indeed to all pleadings: they will be found more fully collected in Mr. Chitty's treatise on *Pleadings*, vol. 1, 195 to 209.

The declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plt. hath sustained, and the time and place, and other circumstances, with such precision, certainty, and clearness, that the deft. knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, and that the jury may be enabled to give a complete verdict upon the issue; and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises: *Cowp.* 682; 6 *East*, 422; 5 *T. R.* 623. Facts only are to be stated, and not arguments or inferences, or matter of law, *ib.*; and the party can only succeed in the facts as they are alleged and substantially proved. But, though the general rule is, that facts only are to be stated, yet there are some instances in which the statement in the pleading is proper, though it does not accord with the real facts, the law allowing a fiction, as in ejectment, trover, detinue, &c.: 2 *Burr.* 667; 1 *N. R.* 140. No fact that is not essential to substantiate the pleading should be stated. The statement of immaterial or irrelevant matter is not only censurable on the ground of expense, but frequently affords an advantage to the opposite party, either as the ground of a variance, or as rendering it incumbent on \*the party pleading to adduce more evidence than would otherwise have been necessary, though, indeed, if the matter unnecessarily stated be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, it being a maxim, that *utile per inutile non vitiatur*. See cases, &c., in *Chit. on Pl.* 208, 9, 10. Besides this, the pleading must not state two or more facts, either of which would of itself, independently of the other, constitute a sufficient ground of action or defence: *Co. Lit.* 304, a.; *Com. Dig. Pleader*, C. 33, E. 2; 1 *Chit. Pl.* 208.

The facts should be stated logically, in their natural order: as, on the part of the plt., his right, the injury, and consequent damage, and these with certainty, precision, and brevity. The facts, as stated, must not be senseless or repugnant, nor ambiguous or doubtful in meaning, nor argu-

mentative, nor in the alternative, nor by way of recital, but positive, and according to their legal effect and operation: *Doug.* 666-7; 1 *Chit. Pl.* 211; *Stephen*, 378 to 405.

*Certainty* signifies a clear and distinct statement, so that it may be understood by the opposite party, by the jury who are to ascertain the truth of such statement, and by the court who are to give judgment: *Cowp.* 682: *Com. D. Pleader*, C. 17. Less certainty is requisite when the law presumes that the knowledge of the facts is peculiarly in the opposite party, and so when it is to be presumed that the party pleading is not acquainted with minute circumstances: 13 *East*, 112; *Com. D. Pleader*, C. 26; 8 *East*, 85. General statements of facts, admitting of almost any proof, are objectionable, 1 *M. & S.* 441, 3 *M. & S.* 114; but, where a subject comprehends a multiplicity of matter, there, in order to avoid prolixity, general pleading is allowed: 2 *Saund.* 411, n. 4; 8 *T. R.* 462. In the construction of facts stated in pleading, it is a general rule that every thing shall be taken most strongly against the party pleading, 1 *Saund.* 259, n. 8; or, rather, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them, 2 *H. Bla.* 530, for it is to be intended that every person states his case as favourably to himself as possible, *Co. Lit.* 30, 36; but the language is to have a reasonable intendment and construction, *Com. D. Pleader*, C. 25; and, if the sense be clear, mere exceptions ought not to be regarded: 5 *East*, 529. And, where an expression is *capable* of different meanings, that shall be taken which will support the averment, and not the other, which would defeat it: 4 *Taunt.* 492; 5 *East*, 257. After verdict, an expression should be construed in such sense as would sustain the verdict: 1 *B. & C.* 297.

With respect to the facts to be stated, there are some which the court will, *ex officio*, take notice of without being stated, and there are others which need not, though they should be established in evidence to entitle the party pleading to succeed. The court will take notice when the king came to the throne, 2 *Ld. Raym.* 794; his prerogatives, *ib.*, 980; proclamations, &c., 1 *Ld. Raym.* 282, 4 *M. & S.* 532: but private orders of council, pardons, and declarations of war, &c., must be stated, or the court will not notice them: 3 *M. & S.* 67; 3 *Camp.* 61, 67. The time and place of holding *Parliaments*, and their course of proceedings, need not be stated, 1 *Ld. Raym.* 343, 210, 1 *Saund.* 131; but their journals must: 1 *Ld. Raym.* 15; *Cowp.* 17. *Public statutes*, and the facts they ascertain, 1 *T. R.* 145, *Com. D. Pleader*, C. 76, need not be stated; but *private* acts, 1 *Ld. Raym.* 381, 2 *Doug.* 97, must. The ecclesiastical, civil, and marine laws are noticed, *Bro. Ab. Quare Impedit*, pl. 12, 1 *Ld. Raym.* 338; but foreign, 2 *Cart.* 273, *Cowp.* 174, and plantation and forest, 2 *Leon*, 209, laws must. Common-law rights, duties, and *general* customs, customs of gavelkind and borough English, *Doug.* 150, 1 *Ld. Raym.* 175, 1542, 1025, *Co. Lit.* 175, *Cro. Car.* 561, need not be stated, but particular *local* customs must: 1 *Rol Rep.* 109; 9 *East*, 185; *Str.* 187, 1187; *Doug.* 387. The *almanack* is part of *the law of the land*, and the courts take notice [\*417] thereof, and the days of the week, and of the movable feasts and terms: *Doug.* 380, 1 *Roll. Ab.* 524, c. pl. 4; 2 *Salk.* 626. The

division of *England* into *counties* will be, *ex officio*, noticed, 2 *Inst.* 557, *Marsh.* 124; but not so of a less division, *ib.*, nor of *Ireland*; 1 *Chit. Rep.* 28, 32; 3 *B. & A.* 301, *s. c.*; 2 *D. & R.* 15; 1 *B. & C.* 16, *s. c.* The court will take judicial notice of the incorporated towns, of the extent of ports, and the river *Thames*: *Str.* 469; 1 *H. Bla.* 356. So, it will take notice of the meaning of English words and terms of art according to their ordinary acceptation, 1 *Roll. Ab.* 86, 525; also, of the names and quantities of legal weights and measures: 1 *Roll. Ab.* 525. Courts will take notice of their own course of proceedings, 1 *T. R.* 118, 2 *Lev.* 176, and of those of the superior courts, 2 *Co. Rep.* 18, *Cro. J.* 67; the privileges they confer on their officers, 1 *Ld. Raym.* 869, 898; of courts of general jurisdiction, and the course of proceedings therein, as the Court of Exchequer in *Wales*, and the counties palatine, 1 *Ld. Raym.* 154, 1 *Saund.* 73; but the courts are not bound, *ex officio*, to take notice who were or are the judges of another court at *Westminster*, 2 *Andr.* 74, *Str.* 1226; nor are the superior courts, *ex officio*, bound to notice the customs, laws, or proceedings of inferior courts of limited jurisdiction, 1 *Rol. Rep.* 105, 2 *Ld. Raym.* 1334, *Cro. El.* 502; unless, indeed, in courts of error: *Cro. Car.* 179.

It is not necessary to state that which is a mere matter of *evidence* of a fact, though the fact itself should be stated: 9 *Rep.* 9, *b.*; *Willes*, 130; 1 *Ld. Raym.* 8.

Where the law presumes a fact, as that a person is innocent of a fraud or crime, or that a transaction is illegal, it need not be stated: 4 *M. & S.* 105; 2 *Wils.* 147; *Co. Lit.* 78, *b.*; 1 *B. & A.* 463.

Matter which should come more properly from the other side, as it is presumed to lie more in the knowledge of the other party, or is an answer to the charge of the party pleading, need not be stated, unless in pleas of estoppel and alien enemy; but this rule must be acted upon with caution, for, if the fact in any way constitute a condition precedent, to enable the party to avail himself of the charge stated in his pleading, such fact should be stated: *Com. D. Pleader*, C. 81; 1 *Leon.* 18; 2 *Saund.* 62, *b.*; 4 *Camp.* 20; 11 *East*, 638. And see cases, 1 *Chit. Pl.* 206; *Stephen*, 354.

*Several Counts.*] If there is one cause of action, the whole should be aptly stated in one count: see 2 *Bingh.* 4; 3 *Taunt.* 157. A declaration may, however, consist of as many counts as the case, and it is usual to set forth the plt.'s cause of action in various shapes, in different counts, so that, if the plt. fail in the proof of one count, he may succeed on another: 3 *Bl. Co.* 295; 3 *Wils.* 185. In framing these several counts, any unnecessary repetition of the same matter should be avoided. By an inducement in the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided: 1 *Chit. Pl.* 353. See the observations of *Lawrence, J.*, 7 *East*, 506, and 2 *H. Bl.* 131, 132, 2 *Wils.* 114, 115, 2 *W. Bl. Rep.* 1038. But, unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for, though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations; and, consequently, they must independently contain all necessary allega-

tions, or the latter count must expressly refer to the former: *Bac. Ab. tit. Pleas and Pleading, B. 1*. If the variations in the different counts be not substantial, or such counts otherwise render the declaration vexatiously long, the court will sometimes order them to be struck out: See *Tidd*, 495, 667; *Meek v. Oxlade*, 1 *N. R.* 289.

*Joinder of Counts.*] Care should be taken not to insert any counts that \*cannot be joined in the same action, a misjoinder [\*418] being a ground for a general demurrer, or an arrest of judgment, or a writ of error: 2 *B. & P.* 424; 4 *T. R.* 347; *infra*. The rule as to what forms of action may be joined together, is that, when the *same plea* may be pleaded, and the *same judgment* given, on all the counts of the declaration, or when the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different, as in the case of debt upon bond, and on simple contract, they may be joined: 2 *Saund.* 117, c.; 1 *T. R.* 276, 277; *Bac. Ab. tit. Actions in General; Com. D. tit. Action, G.*; 1 *Chit. Pl.* 180, *Tidd*, 11. Assumpsit and debt, 2 *Smith*, 618, 3 *Smith*, 114, or assumpsit and an action on the case, as for a tort, cannot be joined, 1 *T. R.* 276, 277, 1 *Vent.* 366, *Carth.* 189, 3 *B. & A.* 208; nor assumpsit with trover, 2 *Lev.* 101, 3 *Lev.* 99, 1 *Salk.* 10, 3 *Wils.* 354, 6 *East*, 335, 2 *Chit. Rep.* 348; nor trover with detinue, *Willes*, 118. With respect to what right or liabilities may be joined in the same form of action, it is a rule that, where the same form may be adopted for several distinct injuries, the plt. may, in general, proceed for all in one action, though the several rights affected were derived from different titles; but a person cannot, in the same action, join a demand in his own right and a demand as representative of another, or *in autre droit*, nor demands against a person on his own liability and on his liability in his representative capacity: *Bac. Ab. tit. Actions in General, C.*; 2 *Vin. Ab.* 62; *Co. D., tit. Actions, G.*; 1 *Chit. Pl.* 182, &c. See "*Partners*," "*Husband and Wife*," "*Bankrupt*," "*Executors*."

A demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach: 1 *M. & S.* 355, 366. The plt. cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi*, so as to prevent the operation of the demurrer, 1 *H. Bl.* 110, 11, 13, 14, 4 *T. R.* 360, *Tidd's Prac.* 8th Ed. 735, 1 *Saund.* 207, c.; though the court will, in general, give the plt. leave to amend by striking out some of the counts on payment of costs: 4 *T. R.* 348. In some cases, however, a misjoinder may be aided by intendment after verdict: 2 *Lev.* 110; *Com. D. tit. Actions, G.*; 2 *Vin. Ab.* 47, pl. 7.

The jury may assess entire or distinct damages on each of the counts: 2 *M. & S.* 533; 11 *Mod.* 196. If *distinct* damages be assessed, judgment may be given upon either of the counts; but, if the jury find *entire* damages on all the counts, the judgment must be entire: in which case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable: *Cowp.* 276; 3 *Wils.* 185; 2 *Saund.* 171, b.; *Doug.* 722, 730; 3 *M. & S.* 110.

*Conclusion as to Damage.*] When damages are the principal object of the action, the declaration should conclude, "to the damage of the plt.," of a sum sufficient to cover the real damages sustained: *Co. D. tit.*

*Pleader*, c. 84; 10 *Co.* 116, b., 117, a. b.; 2 *Lev.* 57. In general, the plt. cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration: 10 *Co.* 117, a. b.; *Vin. Ab. tit. Damages*; R.; *Com. D. tit. Pleader*, C. 84; 4 *M. & S.* 100. It is usual, in practice, to state a sum sufficient to cover the real demand, with interest, when recoverable, up to the time of final judgment, taking care, in actions by original on account of the fine, not to lay the damages unnecessarily high; and, in such action by original, the declaration ought not, in strictness, to vary from the writ in the amount of the damages; but, in proceedings by bill, a variance in the amount of the damages, between the *ac-etiam* part of the latitat and the declaration, is not material: 5 *T. R.* 402; 5 *J. B. Moo.* 209. An omission in stating damages, when necessary, would be bad on demurrer, and, perhaps, after judgment.

In actions against *attorneys*, and other officers of the court, the declaration should conclude, and therefore "prays relief," &c., instead of "brings his suit," &c., *Gilb. C. P.* 49; but a mistake in this respect is no cause of demurrer: *Andr.* 247; *Barnes*, 3.

*Pledges*, &c.] In concluding a declaration by bill, it is usual to state the pledges to prosecute; but an omission in this respect is quite immaterial: 3 *T. R.* 157, 8; 2 *H. Bl.* 161. In actions by executors or administrators, a profert of the letters testamentary or administration is made: see *post*, "*Executors*."

### Precedents.

#### BEGINNING AND CONCLUSION OF DECLARATIONS.

See form of beginning and conclusion of a declaration by original, *post*, "*Præcipe*," *ante*, "*Debt*," "*Covenant*."

#### BEGINNING AND CONCLUSION OF A DECLARATION IN K. B. BY BILL.

Ellenborough (or, "In the K. B.")

— Term, 9 Geo. 4.

Middlesex (*venue*) to wit. J. N. complains of J. S., being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of (*as the plea is*), for that whereas, &c. (*here set forth the cause of action, and conclude thus*;) to the damage of the said J. N. of £—; and therefore he brings his suit, &c.

Pledges to prosecute, { John Doe  
and  
Richard Roe.

#### THE LIKE AGAINST A PRISONER IN CUSTODY OF THE SHERIFF.

Ellenborough.

— Term, in the 7th year of the reign of  
King Geo. the Fourth.

Middlesex (*venue*) to wit. J. N. complains of J. S., being in the custody of the sheriff of Middlesex, by virtue of a certain precept called a bill of Middlesex (or, "writ of our said lord the king, called a latitat"), issued at the suit of the said J. N., out of the court of our said lord the king, before the king himself, against the said J. S., in this suit, and returnable in the same court on — next after —, in this same term, of a plea of trespass on the case upon promises; for that whereas, &c. (*here state cause of action and conclude as supra*.)  
*Pledges*, &c.

#### THE LIKE AGAINST A PRISONER IN CUSTODY OF THE SHERIFF OF A COUNTY PALATINE.

Middlesex to wit. J. N. complains of J. S., being in the custody of the sheriff of the county palatine of Lancaster, by virtue of a certain writ of our lord the now king, called a latitat, issued at the suit of the said J. N., out of the court of our said lord the king, before the king himself, against the said J. S., in this suit, directed to the chancellor of the said county pala-

time, or to his deputy there, and returnable in the same court, on, &c., in this same term, and also by virtue of a certain other writ of our said lord the king, under the seal of the said county palatine, thereupon duly made and directed to the sheriff of the same county palatine; for that whereas, &c. (In Chester the writ is directed "to the chamberlain of our county palatine of Chester, or to his deputy;" and in Durham, "to the Rev. Father in God, —, by divine permission, Lord Bishop of Durham, or to his chancellor there.")

**THE LIKE AGAINST TWO, ONE IN CUSTODY OF SHERIFF, AND THE OTHER OF MARSHAL.**

Middlesex (venue) to wit. J. N. complains of J. S. and G. H., the said J. S. being in the custody of the sheriff of Middlesex, by virtue, &c. (as above), and of the said G. H., being in the custody of the marshal, &c., for that whereas, &c.

**THE LIKE AGAINST A DEFENDANT SUED BY A WRONG NAME.**

Middlesex (venue) to wit. J. N. complains of J. S., who was arrested (or, "served with process") by the name of G. H., being, &c., for that whereas, &c. (the right name throughout the declaration afterwards, or describes him merely as "defendant.")

**THE LIKE IN K. B. WHERE ONE OF THE PLTS. DIED AFTER THE ISSUING OF WRIT, AND BEFORE DECLARATION.**

Ellenborough.

\*Middlesex to wit. J. N., by —, his attorney, comes and gives the court of our lord the king, before the king himself, at Westr., in the county of Middx., [\*420] to understand and be informed, that J. S., now in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, was arrested by virtue of a certain precept called a bill of Middlesex (or "writ called a latitat,") issued out of the court of the said lord the king, before the king himself, against him, the said J. S., at the suit of him, the said J. N., and one G. H.; and that, since the issuing the said precept (or, "writ"), and before this day, to wit, on, &c., the said G. H. died, to wit, at, &c. (venue in action), and the said J. N. then and there survived him, which the said J. S. doth not deny, but admits the same to be true; and hereupon the said J. N. complains, by —, his attorney, against the said J. S. of a plea of trespass on the case upon promises (or as the plea is), for that, whereas, &c. (proceed in the usual way, laying the promises to the plt. and his deceased partner, and concluding to the damage of the surviving plt.)

**THE LIKE WHERE ONE OF THE DEFTS. DIED AFTER THE ISSUING OF THE WRIT, AND BEFORE DECLARATION.**

\*Ellenborough.

Middlesex to wit. J. N. comes, &c. (as in the last precedent to the asterisk and then proceed as follows:) and one G. H., at the suit of the said J. N.; and that, since issuing the said precept (or, "writ"), and before this day, to wit, on, &c., the said G. H. died, to wit, at, &c., and the said J. S. then and there survived him, which the said J. S. doth not deny, &c. (as in the above to the end, laying the promises to J. S. and the deceased party.)

**THE LIKE TO DETAIN A PRISONER IN CUSTODY OF THE MARSHAL IN VACATION, FOR A CAUSE OF ACTION ACCRUING IN SUCH VACATION.**

Ellenborough.

Trinity Term, in the 9th year of the reign of King George the Fourth.

Middlesex (venue) to wit. Be it remembered that, on the 3d day of August, in the 9th year of the reign of King George the Fourth, J. N. brought into the office of the clerk of the declarations of the court of our lord the now king, before the king himself, according to the course and practice of the same court, his certain bill against J. S., being in the custody, &c. of a plea, &c., (as the plea is), and filed the same bill as of Trinity Term, in the 9th year of the reign of our said lord the king; which said bill follows in these words: that is to say, to wit, A. B. complains of J. S., being, &c. (in the usual manner as in the first form.)

**BEGINNING AND CONCLUSION OF A DECLARATION IN ASSUMPSIT, CASE, TROVER, TRESPASS, OR EJECTMENT, IN C. P.**

In the C. P.

Easter Term, 7 Geo. 4.

Middlesex (venue) to wit. J. S. was attached to answer J. N. of a plea of (as the plea is); and thereupon the said J. N. by —, his attorney, complains, for that whereas, &c. (here state the cause of action, and conclude as follows:) Wherefore the said plt. saith that he is injured, and hath sustained damage to the amount of £—; and therefore he brings his suit, &c.

**THE LIKE WHERE ONE OF THE PLTS. DIES, AFTER THE ISSUING OF THE WRIT.**

— to wit. C. D. was attached to answer A. and B. of a plea of (as the plea is); and thereupon the said A., by —, his attorney, comes and gives the court here to under-



stand and be informed, that, since the suing out of the original writ in this cause, and before this day, to wit, on, &c., at, &c., the said B. died, which the said C. D. doth not deny, but admits the same to be true; and thereupon the said A., by his attorney aforesaid, complains that, whereas, &c.

The form where one of several debts. dies is the same as the last, *mutatis mutandis*.

#### BEGINNING AND CONCLUSION OF A DECLARATION IN THE EXCHEQUER.

In the Exchequer of Pleas.

Term, 9 Geo. 4.

Middlesex (*venue*) to wit. J. N., a debtor to our sovereign lord the king, cometh before the barons of his majesty's Exchequer, on —, the — day of —, in [421] this term, by —, his attorney, and \*complaineth by bill against J. S., present here in court the same day, of a plea of trespass on the case, &c., for that, &c. (*state cause of action, and conclude thus:*) to the damage of the said plt. of £—, whereby he is the less able to satisfy our said lord the king the debts which he owes to his majesty at his said Exchequer; and therefore he brings his suit, &c.

Pledges to prosecute, { John Doe  
and  
Richard Roe.

#### COMMENCEMENT AND CONCLUSION OF A DECLARATION IN THE COURTS OF GREAT SESSIONS IN WALES.

In the Court of Great Sessions for —.

G. H. was attached to answer A. B. of a plea of trespass on the case upon promises, and there are pledges to prosecute, to wit, John Doe and Richard Roe; and thereupon the said A. B., by —, his attorney, complains, for that whereas (*state the cause of action, as in declaration in the courts of Westminster; it is not necessary to state that the facts occurred within the jurisdiction of this court: see ante, 414; 1 Saund. Rep. 74. Conclude as follows:*) Wherefore the said A. B. saith, that he is injured, and hath sustained damage to the amount of £—; and therefore he brings his suit, &c.

#### THE LIKE IN COMMON PLEAS AT LANCASTER.

In the Common Pleas at Lancaster.

Lancaster to wit. C. D. was attached to answer A. B. of a plea of trespass on the case upon promises; and thereupon the said A. B., by —, his attorney, complains, for that whereas, &c. (*State the cause of action, as in declaration in the courts at Westminster; it is not necessary to state that the facts occurred within the jurisdiction of this court: ante, 414; see 1 Saund. Rep. 74. Conclude as follows:*) Wherefore the said A. B. saith, that he is injured, and hath sustained damage to the amount of £—, and therefore he brings his suit, &c.

#### THE LIKE IN COMMON PLEAS AT DURHAM.

In the Court of Pleas, held at Durham, the — day of —, in the — year of the reign of King George IV.

— to wit. C. D. was attached to answer A. B. of a plea of trespass on the case upon promises; and thereupon the said A. B., by —, his attorney, complains, for that whereas, &c. (*State the cause of action, as in declarations in the courts at Westminster; it is not necessary to state that the facts occurred within the jurisdiction of this court: ante, 414, 1 Saund. Rep. 74. Conclude as follows:*) Wherefore the said A. B. saith, that he is injured, and hath sustained damage to the amount of £—; and therefore he brings his suit, &c.

#### COMMENCEMENT AND CONCLUSION OF DECLARATION IN THE PALACE COURT.

In the Palace Court.

Palace Court to wit. A. B., by —, his attorney, complains against C. D., of a plea of (*as the plea is*), for that, whereas, &c. (*alleging every material fact to have happened within the jurisdiction of the court, ante, 414, and conclude as follows:*) to the damage of the said A. B. of £—; and therefore he brings his suit, &c. "And the said A. B. avers, that he is not, nor is the said C. D., nor were they, nor was either of them, at the time of levying the plaint of him, the said A. B., here in the court of the king's household." Pledges, &c.

#### THE LIKE IN COUNTY COURT.

In the County Court of the county of —.

— to wit. A. B., by —, his attorney, complains of C. D. of a plea of trespass on the case upon promises, for that whereas the said C. D., on, &c., at, &c., and within the jurisdiction of this court, was indebted, &c. (*alleging every material fact, as well the consideration of the promise as the contract itself, to have taken place with the jurisdiction, ante, 414.*)

See other forms of commencements and conclusions of declarations, 2 *Ch. Pl.* 12 to 14. For such forms relative to the plt.'s or deft.'s character in which he is sued, see "*Attorney*," "*Bankrupt*," "*Husband and Wife*," "*Partner*," "*Executors*."



## \*DECREE.

[\*422]

See "CHANCERY."



## DEED.

**PROOF OF**—*Production of*, 422.—*When Strict Proof of, necessary or not, ib.*—*Mode of Proving Execution*, 423.—*Signing, Sealing, and Delivery, when requisite, ib.*—*Identity*, 424.—*What Witness should prove, ib.*—*Enrolment of Deeds, ib.*—*Proof of Execution, where no Subscribing Witness*, 425.—*Proof of, by Subscribing Witness, ib.*—*Excuse for not Producing Subscribing Witness*, 426.

**PROOF OF**—*Production of.*] In order to prove the execution of a deed, it must be produced, or the non-production be accounted for by proving that it has been lost or destroyed, or is in the possession of the opposite party, in which case it must also appear in evidence, that he has had notice to produce it; for the best evidence of a written instrument consists in its actual production, and secondary evidence of it cannot be admitted, until the impossibility of producing it has been shown. Where the deed has been pleaded with a profert, the production cannot be supplied by a proof of the party's inability to produce the deed, as the party has, by his averment of profert, precluded himself from that resource: *Smith v. Woodward*, 4 *East*, 583; 1 *Esp. Rep.* 337; 1 *Saund.* 9, *a.* See, further, as to when secondary evidence is admissible, *post*, "*Secondary Evidence*;" and see *infra*, as to the effect of production by the opposite party. After proof of notice, and other essentials to entitle the party to give secondary evidence, a counterpart of a deed may be admitted: *R. v. Inhab. of Castleton*, 6 *T. R.* 236. Where there is no counterpart, an examined copy; if no examined copy, parol evidence: *B. N. P.* 254.

*When strict Proof of Execution necessary or not.*] When a party asserts the execution and existence of a deed in evidence, he must prove the same, and all the requisites attending the execution of it. In some cases, this strict proof of execution is unnecessary, as where the opposite party in a suit enters into an admission of the execution, *ante*, 38, or pays money into court on the count on which the deed is stated: *post*, "*Payment into Court*." A deed may be given in evidence under a rule of court, without proof of execution: *B. N. P.* 256; 1 *Sid.* 269. Where a party to a suit, in pursuance of a notice to which he is a party, and under which he claims a beneficial interest, produces the deed, it will not be incumbent upon the adversary, even though a stranger to

the instrument, to call the attesting witness, or otherwise to prove its execution, as in other cases: 3 *Taunt.* 60; 8 *East*, 548; 2 *Camp.* 94. It was formerly held, that the production of a deed by the adverse party, in compliance with a notice for that purpose, superseded the necessity of calling the subscribing witness, in order to prove its execution, *R. v. Inhab. of Middlesex*, 2 *T. R.* 41, 5 *ib.* 366; these cases, however, were denied in *Gordon v. Secretan*, 8 *East*, 548, *Gow*, C. 26. And, where the party producing the deed, does not claim an interest under it, the party calling for it must prove in the regular manner: *ib.* In an action against the sheriff, for taking insufficient pledges in replevin, the replevin-bond produced in evidence by the deft. dispenses with proof by plt. of the execution: *Scott v. Waithman*, 3 *Stark.* 169.

\*When the party *refuses to produce* the instrument, it is to [\*423] be presumed *omnia rite acta*; it will therefore be presumed that an agreement was stamped, unless the contrary appear: 1 *Stark.* 35.

The *recital* of a deed, in another deed, is evidence against the party who executes the reciting deed, or against any person claiming under him, *ante*, 43, *Ford v. Grey*, 1 *Salk.* 285: thus, where a party claims by virtue of an assignment of a deed, it is sufficient to prove the assignment: *Nash v. Turner*, 1 *Esp. Rep.* 218.

Where a deed is thirty years old it proves itself, and is admissible without evidence of its execution, or of the handwriting of the obligor: *Comp. of Chelsea Water-Works v. Cowper*, 1 *Esp. Rep.* 275. But, it is said (*B. N. P.* 255), some account ought to be given of its custody, as (*Gilb. Ev.* 97) it should be shown that possession has accompanied it; but it has been held sufficient to produce a certificate of settlement, thirty years old, without showing that it had been kept in the parish chest: *R. v. Inhab. of Rington*, 5 *T. R.* 259. Even if it appear that the attesting witness is alive, and capable of being produced, it seems unnecessary to call him, where the deed is thirty years old: *Marsh v. Colnett*, 2 *Esp. Rep.* 665. If there is any erasure or interlineation in an old deed, giving an appearance of fraud, it ought to be proved in the regular manner by the subscribing witness; or, if he be dead, by proof of such death, his handwriting, and the handwriting of the party executing, *B. N. P.* 255. See, further, as to proof of execution of ancient writing, *post*, "*Handwriting.*"

*Mode of Proving Execution.*] The sealing and the delivery of the deed, which are essential to its validity as a deed, must be proved, which must be done by a third person, if there was no attesting witness, and by such attesting witness, if there was one.

*Sealing is essential* to a deed, and must be proved; but it is immaterial with what seal it is sealed. One piece of wax will suffice for several obligors, *Shep. Touch.* 55; and it is sufficient if the obligor acknowledge any impression already made to be his seal: *Com. D. Fait.* Thus, where one of two defts., in the presence of the other, and by his authority, executed a bill of sale for them both, the two defts. being partners in the transaction, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held, that no particular mode of delivery was necessary; and that it was

sufficient if the party treated it as his own: *Ball v. Dunsterville*, 4 T. R. 315.

*Delivery.*] This must be proved; no particular form or ceremony is essential: it will be sufficient if a party testifies his intention in any manner, whether by action or by word, to deliver or put the deed into the possession of the other, as by throwing it down upon the table for the other to take up: *Com. D. Ev. A. 3*. If the deed be made by a corporation, actual delivery is not requisite, and the affixing of the corporate seal, or any other used for the occasion, is tantamount to a delivery, *Phil. Ev. 449*; but, if the corporate body has given a letter of attorney to deliver, the deed is not theirs until delivered: *Co. Lit. 36, a*. If the deed be executed by virtue of a power of attorney from the obligor, the power of attorney must be produced: *Johnson v. Mason*, 1 *Esp. Rep. 89*. A valid delivery may also be effected by words, unaccompanied by an actual delivery, as where the deed lies on the table, and the obligor desires the obligee to take it up, and says it is his deed: *Co. Lit. 36, a*. If once the obligor deliver it as his deed, with intent that it shall be so, it will take effect, and he cannot, by any subsequent words, explain or show his intent to be otherwise: *Com. D. Fait. A. 3*. A person executing a deed, by virtue of a power of attorney, for another, must do it in the name of the \*principal, but no particular form of words is essential: *Wilks v. Back*, 2 *East*, 142. [\*424]

*Signing* is not an essential part of a deed at common law; but it has been required, in some cases, by act of Parliament, and is often requisite for the due execution of powers. In such cases, therefore, signing is as necessary as sealing: 1 *Phil. Ev. 448*.

It is not absolutely necessary the witness should see the party actually sign or seal; proof that he saw him deliver it signed or sealed will suffice: 1 *Phil. Ev. 448*. A subsequent request, by one of the parties, to sign the attestation, is sufficient proof of such party's execution of the deed: *Peake*, 146. Where a bond was executed by the deft., and attested by a witness in one room, and was then taken to an adjoining room, and, at the request of the deft.'s attorney, and in the deft.'s hearing, was attested by another witness, who knew the deft.'s handwriting, it was held, that the execution might be proved by the latter witness, and the whole be considered as one entire transaction: *Park v. Mears*, 2 *B. & P. 17*; and see *Anon. cited Archb. Pl. & Ev. 378*. An acknowledgment by an obligor to the attesting witness, that the instrument is his deed, is in all cases sufficient: *Powell v. Blacket*, 1 *Esp. Rep. 97*. It is not necessary for the witness to prove that certain blanks, which existed in the deed, were filled up at the time of the execution: *England v. Roper*, 1 *Stark. 304*.

*Identity.*] Some evidence is necessary to connect the deft. with the bond, which the subscribing witness is often unable to furnish. Where the witness to a bond stated that he saw it executed by a person who was introduced under the name of Hawkshaw (the name of the deft.) but could not identify him with the deft., the plt. was nonsuited: *Parkins v. Hawkshaw*, 2 *Stark. 239*; *Middleton v. Sanford*, 4 *Camp. 34*.

*Enrolment of Deeds.*] It seems that the deeds enrolled may be admitted in evidence, without proof of execution. Thus, a deed of bar-

gain and sale, acknowledged by the bargainee and enrolled, by which a term for years was assigned, was given in evidence without any proof made of the bargainer's sealing and delivery thereof: *Holt, C. J.*, and the rest of the court, held, that the acknowledgment of the party in a court of record, or before a master extraordinary in the country, is good evidence of its being sealed and delivered: *Smarth v. Williams*, 1 *Salk.* 280; 3 *Lev.* 387. *Gilbert, C. B.*, draws a distinction between deeds which require and which do not require enrolment, and considers the rule applicable in the former, but not in the latter case: *Gilb. Ev.* 86. *Buller, J.*, however, dissents from this doctrine, and says, that the case of *Smarth v. Williams* is wrongly reported; as it appears, from the report in *Lev.*, that the acknowledgment was by the bargainer, and that it was only a term that passed, and, consequently, was not an enrolment within the stat.; and adds, "It is absurd to say that a release, which has been enrolled upon the acknowledgment of the releasor, shall not be admitted in evidence against him, without being proved to be executed, because such release does not need enrolment, and that was the case in *Smarth v. Williams*: the deed there did not need enrolment; yet, being enrolled, on the acknowledgment of the bargainer, it was read against him without being proved:" *B. N. P.* 256. In the case of *Lady Holcroft v. Smith*, 2 *Freem.* 259, a distinction was made between deeds of bargain and sale (enrolled in pursuance of the stat. of *H. 8.*) and other deeds enrolled; and it was held, that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than as against the party who executed it, and all claiming under him; so, the endorsement by the proper officer, on a deed of bargain and sale, enrolled according to 27 *H. 8. c. 16*, is evidence of the enrolment, *Kinnersley v. Orpe*, 1 *Doug.* 56; and the date of enrolment, endorsed by the clerk of the enrolments, is conclusive evidence of the date: *R. v. Hopper*, 3 *Price*, 495.

*Proof of Execution where no Subscribing Witness.*] In this case the party's handwriting and execution of the deed must be proved, as in other cases: *supra*, and *post*, "*Handwriting*."

*Proof of, by Subscribing Witness.*] If there was a subscribing witness to the execution of the deed, he ought to be subpoenaed to prove it. The subscribing witness alone is competent to prove the execution, as he may be able to state the circumstances of the transaction, which may be material, and unknown to others; and his testimony cannot be dispensed with, though the deft. has admitted his execution of the deed, *Abbott v. Plumbe*, 2 *Doug.* 205, 2 *East*, 187, 7 *T. R.* 267, even in answer to a bill in Chancery, *Call v. Dunning*, 4 *East*, 53, 5 *T. R.* 366; and this rule applies, whether the deed be the foundation of the action or but collateral, *Breton v. Cope*, *Pea. Rep.* 30; or whether the question be between the parties to the deed or strangers: 4 *East*, 53.

It is sufficient to call one attesting witness, though there are several, *B. N. P.* 264, 1 *P. Wms.* 471, unless a suspicion attaches to the execution of the deed, when it is more prudent to call them all: 4 *Burr.* 2224.

Evidence of the handwriting of an attesting witness will not, however, be sufficient, to prove a deed; if there are two of them, and the absence of one be only accounted for, the other must be called: *Cunliff*

v. *Sefton*, 2 *East*, 183. But, though there be two attesting witnesses, and one be dead, and the other in a foreign country, the handwriting of the witness that is dead will be sufficient: *Adam v. Kerr*, 1 *B. & P.* 360.

*Excuse for not producing Attesting Witness.*] It is always necessary, where a deed has been attested, to prove the execution of the instrument by the evidence of the attesting witness. But his absence will be sufficiently accounted for, so as to admit evidence of his handwriting, by proof of his death, *Barnes v. Trompowsky*, 7 *T. R.* 265, *Anon.* 12 *Mod.* 607; or his insanity, *Currie v. Child*, 3 *Camp.* 283, *Burnett v. Taylor*, 9 *Ves.* 381; or his being blind, *Wood v. Drury*, 1 *Ld. Raym.* 734; or from infamy of character, as having been convicted of forgery, *Jones v. Mason*, 2 *Str.* 833, to substantiate which, the conviction must be proved, *ib.*; or plt. may show that he was interested at the time of the attesting, *Swire v. Bell*, 5 *T. R.* 371; in which case it must appear that the plt. did not know of his being interested at the time, or he will not be allowed to object to his competency, *Honeywood v. Peacock*, 3 *Camp.* 196; or that he has become interested since he attested, *Swire v. Bell*, 5 *T. R.* 371; as, by being appointed executor of the obligee, *Godfrey v. Morris*, *Str.* 34, *Buckley v. Smith*, 2 *Esp. Rep.* 697, *Cunliffe v. Sefton*, 2 *East*, 183, *Goss v. Tracey*, 1 *P. Wms.* 287; or where he is absent in a foreign country, or out of the jurisdiction of the court, as in Ireland, *Hodnett v. Formann*, 1 *Stark.* 90; or in America, *Prince v. Blackburn*, 2 *East*, 250, *Wallis v. Delancey*, 7 *T. R.* 266, *n.*; or India, *Coglan v. Williamson*, *Doug.* 93; or France, *Holmes v. Pontier*, *Pea. Rep.* 135, *Adams v. Kerr*, 1 *B. P.* 360; or where it appears that the attesting witness cannot be found, after a fair, serious, and diligent inquiry made for him, *Cunliffe v. Sefton*, 2 *East*, 183; as, where inquiry had been made at the residence of the obligor and obligee, but no information could be obtained concerning the attesting witness, *ib.*; or where it was ascertained he had absconded, to avoid his creditors, *Crosby v. Percy*, 1 *Taunt.* 365, 1 *Camp.* 303, *s. c.*, though the contrary was held in *Pitt v. Griffith*, 6 *Moo.* 538; or, where it was proved that, twelve months previous, the attesting witness had had a commission of bankruptcy sued out against him, and had not appeared at the time fixed for his surrender, *Ld. Ellenb.* observing, "as the [\*426] party did not appear to his commission, I must presume he is out of the kingdom; had he been at his residence at the time fixed for his surrender, I must suppose that he would have surrendered, to save himself from a capital felony," *Wardell v. Farmer*, 2 *Camp.* 284; or where inquiry had been made for the subscribing witness at the Admiralty, whence it appeared, by the last report, that he was serving in his Majesty's navy, but on board of what ship it was not known, *Parker v. Hoskins*, 2 *Taunt.* 223; or where he had gone abroad twenty years before the trial of the cause, and had not been heard of since; and, *p. Ld. Ellenb.*, "proof of the fact of the subscribing witness going abroad twenty years ago (so large a portion of the life of man), and never having been heard of since, would of itself be sufficient," *Doe d. Johnson v. Johnson*, 1 *Ph. Ev.* 455, *n.*, *Doe v. Jesson*, 6 *East*, 84; or where, on a witness being subpoenaed, he said he would not attend, and, on being sought for at the residence of the deft., it was ascertained he had gone to Margate,

on an unsuccessful inquiry there, evidence of his handwriting was admitted: *Burt v. Walker*, 4 B. & A. 697. But proof of the witness being unable to attend from illness, and no hopes entertained of his recovery, will not be a sufficient excuse for his non-attendance, *Harrison v. Blades*, 3 Camp. 457; and *p. Ld. Ellenb.*, "I cannot dispense with the attendance of a witness who is still alive, and within the jurisdiction of the court; if such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries:" *ib.* "But, in all these cases, it ought to be satisfactorily proved, that a reasonable, diligent, and honest inquiry has been made, without any evasion, and without any design to overlook the witness:" 1 *Ph. Ev.* 456, n.

If the subscribing witness is unable, or refuses, to declare the truth, the party is not precluded from calling other witnesses to establish the validity of the instrument, *Burr.* 2224; and thus, where one of the witnesses to a will would not swear the sealing and publication, *Holt, C. J.*, allowed the attestation of the witness to be proved: *Dagwell v. Glasscock*, *Skin.* 413. Proof of the handwriting of the obligor will be sufficient, where the witness admits his signature as attesting witness, but does not, in fact, see the deed executed: *Grellier v. Neale*, *Pea.* 147. Where the witness denies the due execution of the deed, other witnesses may be called to contradict him, and the contrary proved by circumstantial evidence: *Talbot v. Hodson*, 7 *Taunt.* 251; *Doug.* 206; *Digg's case*, *Skin.* 79. And, where two witnesses to a will of real property denied the publishing of the will, and stated that he was incapable of doing so, witnesses were admitted to contradict him: *Skin.* 49.

The handwriting of the party executing must also be proved by other evidence than the testimony of the subscribing witness, where the name of a fictitious person is inserted as a witness, *Fasset v. Brown*, *Pea. Rep.* 23; or where he became a witness without the knowledge or consent of the parties: *McGraw v. Gentry*, 3 *Camp.* 232.

Where the plt. declared on a deed which he stated was in deft.'s possession, who pleaded *non est factum*, and at the trial plt. proved the deed to be in deft.'s hands, who had also been served with a notice to produce it, it was decided that, on non-production of the deed, the plt. might give secondary evidence of it, without calling the subscribing witness, though he was in court: *Cooke v. Tanswell*, 8 *Taunt.* 450. So, where the plt. declared on a lost bond, and a witness stated that there were subscribing witnesses' names to the bond, but that he did not know them, it was held the plt. need not call the attesting witnesses, or either of them: *Pea. Ev.* 82, *Appendix*.



[\*427]

## DEMURRAGE.

FORM OF REMEDY FOR, 427.

FORM OF PLEADINGS, *ib.*PRECEDENTS, *ib.*EVIDENCE FOR PLAINTIFF, 428.—*Measure of Damages*, *ib.*

EVIDENCE FOR DEFENDANT, 429.

*Form of Remedy.*

WHERE the contract for demurrage is under seal, the party entitled to it must bring his action on the covenant to pay it, or bring debt on the deed; and, if there be no contract for demurrage, the declaration should be special on the implied contract to ship or unship the goods within a reasonable time: see *ante*, "*Charter-Party*." The usual clauses, purporting that it is covenanted and agreed by and between the parties, that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful for the freightor to detain the vessel for those purposes a further specified time, on payment of a daily sum, constitute a contract on the part of the freighter, that he will not detain the ship for those purposes beyond the two designated periods; and, if he does so detain her, he is liable to an action on the contract in the form adapted to the nature of the instrument: *Randall v. Lynch*, 12 *East*, 179; *Abbott*, 180.

*Form of Pleadings.*

When the contract is under seal, the declaration must, in general, be framed upon it, and state the terms of the deed, 1 *N. R.* 104, 1 *M. & S.* 573, 2 *ib.* 303; when unnecessary, *ante*, 358. The breach in a declaration on a covenant to pay demurrage should not exceed the limited number of stated days mentioned in the covenant: *Stevenson v. York*, 2 *Chit. Rep.* 570. A tortious detention will not support a count for demurrage: *Harrison v. Wilson*, 2 *Esp. Rep.* 709.

*Precedents.*

## INDEBITATUS ASSUMPSIT FOR DEMURRAGE.

The *indebitatus count* is as *ante*, 139, inserting these words, "for the use of a certain ship or vessel, called, &c. (whereof the said plt. was master) (according to the fact), by the said deft. before that time retained, and kept on demurrage, with certain goods, chattels, and merchandise on board thereof, for a long time before then elapsed, and at the special instance, &c., and being so indebted," &c. (Conclusion as *ante, ib.* The *quantum meruit thereon* is as *ante, ib.*, inserting as follows:) "had before that time suffered and permitted the said deft. to retain and keep, and that he, the said deft., had accordingly retained and kept, a certain other ship or vessel, whereof the said plt. was master (according to the fact), with certain other goods, chattels, and merchandise, on board thereof, on demurrage, for a long time before then elapsed, he, the said deft., undertook," &c. (Conclusion as *ante, ib.*)

See precedent in debt for demurrage, 2 *Chit. Pl.* 426; covenant for, *ib.*, 628; pleas in covenant for, 3 *Chit. Pl.* 1007 to 1009.

*Evidence for Plaintiff.*

[\*428]

In an action for demurrage, the plt. must prove how long he was detained beyond the days allowed by the charter-party, and the days must be working, not running days: *Cockran v. Retby*, 3 *Esp. Rep.* 121. It is usual for the master to produce a protest in evidence: and this, though not directly necessary, is the more prudent course: *Beaves*, 142. To entitle the owner to demurrage, it does not appear necessary that the master should give notice of the ship's arrival to the consignee, *Harman v. Mant*, 4 *Camp.* 161; especially when the consignees have en-



dorsed the bill of lading: *Harman v. Clarke*, 4 *Camp.* 159: see "*Charter Party*."

*Damages.*] If a ship be detained, the daily rate of demurrage mentioned in the charter party will, in general, be the measure of the damages to be paid, but it is not the absolute or necessary measure; more or less may be payable, as justice may require, regard being had to the expense and loss incurred by the owner; and the amount must be settled by a jury: *Abbott*, 181; *Moorson v. Bell*, 2 *Camp.* 616. Where, by a charter-party under seal, the freighter was at liberty to keep the ship on demurrage at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require, the ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of delivery, in an action on the charter-party, it was held, that the master could not recover on this covenant for more than the ten days' demurrage, at £5 per day, at the port of London, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and a breach, averring that the plt. did not pay £5 per day for demurrage for the extra delay beyond the ten days at the port of delivery, and for the delay at Bristol, as well as for the demurrage for ten days' delay at the port of delivery, was held bad: *Stevenson v. York*, 2 *Chit. Rep.* 570.

The price or rate of demurrage may be regulated by the burden of the ship, or quantity of goods she is freighted to carry, or the damage she is likely to sustain by remaining in the port where she is detained; or the loss sustained by not being able to employ her on another service, &c.

#### *Evidence for Defendant.*

If there be a limited time for unloading, deft. will not be allowed to show, in evidence, that the delay was unavoidable, from the crowded state of the docks, *Lear v. Yates*, 3 *Taunt.* 387, *Randall v. Lynch*, 12 *East*, 179, or that it was occasioned by port regulations, or custom-house restrictions, even though it be unlawful on the part of the custom-house to make them, *Bessey v. Evans*, 4 *Camp.* 131; or that the cargo was detained under a prohibition by a foreign government, *Blight v. Page*, 3 *B. & P.* 295; nor will he be allowed to show, that the delay was caused by the goods being placed under other goods, *Harman v. Gaudolph*, *Holt*, 35; or the impossibility of loading the vessel, from the roughness of the weather, or the port's being frozen up, *Thompson v. Wagner*, 4 *Camp.* 335, *n.*; or from the neglect of the consignee in not obtaining a proper license: *Hill v. Idle*, *ib.* 327. But the deft. will not be liable to demurrage if the words of the covenant be "to unload in the usual and customary time," and the delay proceed from the vessel being unloaded in her turn in the bonded ware-houses, *Rogers v. Forresters*, 2 *Camp.* 483; or, if there be no stipulated time to unload, deft. may show the state of the docks prevented him, *Burmester v. Hodg- [429] son*, 2 *Camp.* 489; or deft. may show the delay to have \*oc-

curred from the want of the ship's clearances, which it was the business of the owner to procure: *Barrett v. Dutton*, 4 Camp. 335.

*Where it is impossible to perform the Contract.*] The general rule appears to be, that, if the merchant covenant to do a particular act, which it becomes impracticable for him to do, he must answer for his default, unless the act be or become contrary to the law of his country, such as a trading with an enemy. "The merchant (according to the language of *Ld. Ellenb., Barker v. Hodgson*, 3 M. & S. 267,) is the adventurer, who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue;" and, upon this principle it was held, that a merchant was liable who had covenanted to furnish a cargo at Gibraltar within a limited time, but was prevented from doing so, by a prohibition of intercourse with that shore, on account of the owner: *Abbott*, 182.



## DEMURRER TO PLEADINGS.

NATURE OF, AND WHEN PROPER, 429.

FORM OF, 430.

EFFECT OF, 431,

PRECEDENTS OF, *ib.* 432.

### *Nature of, and when it lies, in general.*

A DEMURRER is an objection made by one party to his opponent's pleading, alleging, he ought not to answer it, for some defect in law in such pleading. It admits the facts, and refers the law arising thereon to the courts: *Co. Lit.* 71, b.; 5 *Mod.* 132. The opposite party may demur when his opponent's pleading is defective, in substance or form; but there can be no demurrer for a defect not apparent in the pleadings.

### *Form of.*

A demurrer is either to the whole or to part of a pleading. When a deft. demurs only, and does not plead to a declaration, his demurrer must cover the whole declaration; otherwise it will be a discontinuance of the whole: so, if he demur to part only, he must plead to the residue; otherwise it will be a discontinuance of the whole. Thus, where, in trespass for taking and carrying away goods, if the deft., *quoad* the taking, demur, but say nothing as to the carrying away, it is a discontinuance: *R. Yelv.* 5. So, if the plt. demur only, and do not reply to the deft.'s plea or pleas, the demurrer must cover the whole, otherwise it will be a discontinuance of the whole, *p. Chamb. J.*, 3 *Rol.* 390; and, therefore, if the deft. plead three pleas, and the plt., in his demurrer say, *quod placitum prædictum est minus sufficiens*, it is a discontinuance, *R. Yelv.* 65, and see 1 *Brownl.* 192, *Yelv.* 5; and the same as to demurrers to replications, rejoinders, &c. But, if the deft. demur to the whole declaration, where there are several counts, or in covenant several breaches,

some of which are sufficient, and others not, or one count which may be bad in part, the plt. will have judgment on those counts, &c., which are sufficient: 1 *Saund.* 286; *Amory v. Brodrick*, 5 B. & A. 715. And this rule applies, also, where there is one count, part of which is sufficient, and the residue is not; when the matters are divisible in their nature, as if a plt. declare for taking his money, and also certain [\*430] goods, without showing that the "goods were his property, the count will be good as to the money; and, if the deft. demur generally to the whole, the plt. will have judgment, 2 *Saund.* 379; so, if part of a breach be good, it is no cause of demurrer to the whole, that special damage is laid, which is not recoverable, 1 D. & R. 361; but where there is a misjoinder, either of parties or causes of action, or breaches, the demurrer must be to the whole: *Kingston v. Nottle*, 1 M. & S. 355. If a plea or replication, which is entire, be bad in part, it is in general bad for the whole, and a demurrer to the whole should be adopted: 1 *Saund.* 28, (2), 337, (1); 2 *Saund.* 124; *Com. D. Plead-er*, Q. 3.

A demurrer is either general or special. A general demurrer lies only for defects in substance, and excepts to the sufficiency in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception: *Co. Lit.* 72, a.; *Steph. P.* 159. Thus if a defective title be alleged, it is a fault in substance for which the party may demur generally; but, if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer: 1 *Saund.* 337. A special demurrer is not necessary for a defect in substance, for, by 27 *El. c. 5. s. 1*, and 4 *Anne, c. 16*, it is provided, in nearly the same terms, that the judges "shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express together with his demurrer, as causes of the same," the latter statute adding this proviso, "so as sufficient matter appear in the said pleadings upon which the court may give judgment, according to the very right of the cause." A general demurrer to a plea in *abatement* will in all cases suffice; *Lloyd v. Williams*, 2 M. & S. 485: it states that it is not sufficient to quash the bill or writ, and prays judgment that the deft. may answer over or further to the declaration. If the plt. demur to a plea in *abatement* as to a plea in bar, the whole action is discontinued: *Carter v. Davies*, 1 Salk. 218, 1 *Show.* 255, s. c.; *Carth.* 187, s. c. To a plea in bar, the demurrer is *quia placitum, &c.*; *materiaque in sedem contenta minus sufficiens in lege existet, &c.*; *unde pro defectu sufficientis placiti, &c.*; *petit judicium, &c.*; either for damages or for debt and damages, &c., according to the nature of the action: *Co. Lit.* 71, b. If the demurrer be to a replication, rejoinder, &c., after stating that the same and the matters therein contained are not sufficient in law, it concludes with a prayer of judgment either against or for the plt., according to the situation of the party demurring.

With respect to the degree of particularity with which, under these

statutes; the special demurrer must assign the ground of objection, it is insufficient to object in general terms, that the pleading is uncertain, defective, &c., but it must be shown specially in what particular the form is defective: *Com. D. Pleader*, Q. 9.

If the deft. is under terms of pleading issuably, he cannot demur specially for a mere defect in form, though he may for a defect in substance: *Berry v. Anderson*, 7 T. R. 530; *Cuming v. Sharland*, 1 East, 411; *Deevey v. Sopp*, 2 Str. 1185. In the K. B., it is said, such terms preclude a special demurrer for form by deft. to any other subsequent pleadings, 2 B. & P. 446, 2 Str. 1185, 7 T. R. 530; but, in C. P., it is otherwise: *Betts v. Applegarth*, T. T. 1817, *Brigh*. It is said, deft., when under such terms cannot demur specially, though for a defect in substance: *Tidd*, 478; *Blich v. Dymoke*, 1 Bing. 379; *sed quære*, and see *Newnham v. Dowding*, 1 Chit. Rep. 711.

### *Effect of.*

With respect to the effect of a demurrer, it is a rule that a demurrer admits all such matters of fact as are sufficiently pleaded: *Gun-dry v. Feltham*, \*1 T. R. 334. The meaning of which rule [\*431] is, that the party, having had his option whether to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse: *Steph*. 161. Thus, in *assumpsit*, stating a grant of a thousand trees, to be cut down in three years, and that, having cut down eight hundred, the deft. promised to allow him to cut down the remaining two hundred if he would not cut them down then; to which the deft. pleads that he had cut down the thousand trees before the promise, the plt. demurs, the demurrer is a confession that he had cut down the thousand trees before the promise: *R. Yelv*. 195. So, in covenant, if the deft. plead covenants performed, and the plt. reply, assigning a breach, to which the defendant demurs, the deft. by his demurrer, confesses the breach and contradicts his own plea: *Speccot v. Sheres*, Cro. El. 829. In debt on a bond, conditioned to pay if A. died without issue living, the deft. pleads that A. died having issue living, *apud B.*, and the plt. demurs for want of a good venue, the demurrer admits that A. had issue living at the time of his death: *R. Dy*. 15, a. So, in debt on bond conditioned to pay within twenty days after the return of a ship, or at the end of eighteen months, the deft. pleads that the ship returned within eighteen months, and that he paid within twenty days after, and the plt. replies, traversing the payment, to which the deft. demurs, the demurrer admits the breach, and it was, therefore, holden, that the plt. should recover: 6 Mo. 349; *Com. D. Pleader*, Q. 5.

It is a rule, that, on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it: *Le Bret v. Papillon*, 4 East, 502. Thus, on demurrer of the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the deft., but the plt., *Anon*. 2 Wils. 150, provided the declaration be good; but if the declaration also be bad in substance, then upon the same principle, judgment would be given for the deft.: 5 Rep. 29, a.; *Steph. Pl*. 162.

*Precedents.*

## GENERAL DEMURRER TO A DECLARATION.

In the K. B. (or C. P. or Exch.) — Term, 9 Geo. 4.  
 C. D. } And the said deft., by —, his attorney, comes and defends the wrong and in-  
 ats. } jury, when, &c.; and says that the said declaration (or, "the said — count, of the  
 A. B. } said declaration"), and the matters therein contained, in manner and form as the  
 same are above stated and set forth, are not sufficient in law for the said plt. to have or main-  
 tain his aforesaid action thereof against him, the said deft., and that he, the said deft., is not  
 bound by law to answer the same, and this he is ready to verify; wherefore, for want of a  
 sufficient declaration (or, "by reason of the insufficiency of the said — count") in this be-  
 half, the said deft. prays judgment, and that the said plt. may be barred from having or main-  
 taining his aforesaid action thereof against him, &c. (*A special demurrer is the same as the  
 above form to the end, concluding thus:*) And the said deft., according to the form of the  
 statute in such case made and provided, states and shows to the court here, the following  
 causes of demurrer to the said declaration (or, "the said — count of the said declaration");  
 that is to say, that (*here set forth the causes of demurrer, and conclude thus:*) and also, further,  
 the said declaration (or, "said — count of the said declaration") is, in other respects, bad,  
 informal, and insufficient, &c.

## DEMURRER TO A PLEA IN ABATEMENT.

In the K. B. (or C. P., or Exch.) — Term, 9 Geo. 4.  
 A. B. } And the said plt., as to the plea of the said deft., by him above pleaded, saith, that  
 v. } the said plea, and the matters therein contained, in manner and form as the same are  
 C. D. } above pleaded and set forth, are not sufficient in law to quash the writ aforesaid of  
 him, the said plt. (*or as the prayer of judgment in the plea in abatement may be*);  
 [\*432] and that the said plt. is not bound by law to answer the same; and this he is ready  
 to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said plt.,  
 prays judgment, &c., and that his writ aforesaid may be adjudged good, and that the said  
 deft. may further answer thereto, &c.

## DEMURRER TO A PLEA IN BAR.

In the K. B. (or C. P., or Exch.) — Term, 9 Geo. 4.  
 And the said plt., as to the said plea of the said deft., by him, (secondly) above pleaded,  
 saith, that the same, and the matters therein contained, in manner and form as the same are  
 above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plt.  
 from having or maintaining his aforesaid action thereof against him, the said deft., and that  
 he, the said plt., is not bound by law to answer the same; and this he, the said plt., is ready  
 to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said plt., prays judg-  
 ment and his damages, by reason of the not performing of the said several promises and un-  
 dertakings in the said declaration mentioned, to be adjudged to him, &c.

## DEMURRER TO AN AVOWRY OR COGNISANCE.

And the said plt. saith, that the said avowry or cognisance of the said deft., and the matters  
 therein contained, in manner and form as the same are above pleaded and set forth, are not  
 sufficient in law for the said deft. to avow or acknowledge the taking of the said cattle, in the  
 said declaration above-mentioned, in the said place in which, &c., to be just; and that he, the  
 said plt., is not bound by law to answer the same; and this he, the said plt., is ready to verify.  
 Wherefore he prays judgment and his damages, by reason of the taking and unjustly detain-  
 ing of the said cattle to be adjudged to him, &c.

## GENERAL DEMURRER TO A REPLICATION.

In the K. B. (or C. P., or Exch.) — Term, 9 Geo. 4.  
 C. D. } And the said deft. saith, that the said replication of the said plt. to the said (se-  
 ats. } cond) plea of him, the said deft., and the matters therein contained, in manner and  
 A. B. } form as the same are above pleaded and set forth, are not sufficient in law for the  
 said plt. to have or maintain his aforesaid action thereof against him, the said deft., and  
 that he, the said deft., is not bound by the law of the land to answer the same; and this he,  
 the said deft., is ready to verify. Wherefore, for want of a sufficient replication in this be-  
 half, he, the said deft., prays judgment if the said plt. ought to have or maintain his afore-  
 said action thereof against him, &c.

## DEMURRER TO A PLEA IN BAR TO A COGNISANCE.

And the said deft. saith, that the said plea in bar of the said plt. to the said cognisance of  
 him, the said deft., and the matters in the said plea in bar contained, are not sufficient in

law to bar him, the said def., from having a return of the said cattle, and that he, the said def., is not bound by the law of the land to answer the same; and this he, the said def., is ready to verify. Wherefore, for want of a sufficient plea in bar in this behalf, he, the said def., as before, prays judgment and a return of the said cattle, together with his damages, costs, and charges, by him in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

JOINDER IN DEMURRER TO A DECLARATION.

In the K. B. (or C. P., or Excq.) — Term, 9 Geo. 4.  
 A. B. } And the said plt. saith, that the said declaration (or, "said — count"), and the  
 v. } matters therein contained, in manner and form as the same are above stated and  
 C. D. } set forth, are sufficient in law for him, the said plt., to have and maintain his aforesaid action thereof against him, the said def., and the said plt. is ready to verify and prove the same, as the court here shall direct and award. Wherefore, inasmuch as the said def. hath not answered the said declaration, (or, "said — count"), nor hitherto, in any manner, denied the same, the said plt. prays judgment and his damages, by reason of the not performing of the said several promises and undertakings (*as the form of action is: see conclusion in replications, post, "Replication"*), in the said declaration mentioned, to be adjudged to him, &c.

JOINDER IN DEMURRER TO PLEA IN ABATEMENT.

[\*433]

In the K. B. (or C. P., or Excq.) — Term, 9 Geo. 4.  
 C. D. } And the said def. saith, that his said plea, by him above pleaded, and the matter  
 ats. } therein contained, in manner and form as the same are above pleaded and set forth,  
 A. B. } are sufficient in law to quash the aforesaid writ of the said plt. (*or according to the prayer of judgment in the plea*); which said plea, and the matters therein contained, he, the said def., is ready to verify and prove, as the said court here shall direct and award. Wherefore, inasmuch as the said plt. hath not answered the said plea, nor hitherto, in any manner, denied the same, the said def., as before, prays judgment of the said writ, and that the same may be quashed, &c.

JOINDER IN DEMURRER TO A PLEA IN BAR.

In the K. B. (or C. P., or Excq.) — Term, 9 Geo. 4.  
 C. D. } And the said def. saith, that his said plea, by him (secondly) above pleaded, and  
 ats. } the matters therein contained, in manner and form as the same are above pleaded  
 A. B. } and set forth, are sufficient in law to bar and preclude the said plt. from having or maintaining his aforesaid action thereof against him, the said def., and that he, the said def., is ready to verify and prove the same, as the said court here shall direct and award. Wherefore, inasmuch as the said plt. hath not answered the said plea, nor hitherto, in any manner, denied the same, the said def. prays judgment, and that the said plt. may be barred from having or maintaining his aforesaid action thereof against him, the said def., &c.

JOINDER TO A DEMURRER TO A PLEA IN BAR IN REPLEVIN.

And the said plt. saith, that the said plea in bar of him, the said plt., to the said cognisance of the said def., and the matters in the said plea in bar contained, are sufficient in law to bar him, the said def., from having a return of the said cattle; and which said plea in bar, and the matters therein contained, he, the said plt. is ready to verify and prove, as the court here shall direct and award. And, because the said def. hath not answered the said plea in bar, nor, in any manner, denied the same, he, the plt., as before, prays judgment and his damages, on occasion of the taking and unjustly detaining of the said cattle, to be adjudged to him, &c.



DEPOSITIONS.

See "ADMISSIONS," 41; "AFFIDAVIT," "BANKRUPT," 248;  
 "CHANCERY," 354.



DESCENT.

See "EJECTMENT BY HEIR," 457. "PEDIGREE."

## DETINUE.

NATURE AND FORM OF REMEDY, 433.

FORM OF PLEADINGS, 434.

PRECEDENTS, *ib.*

EVIDENCE, 435.

*Nature and Form of Remedy.*

DETINUE lies upon a purchase, bailment, or finding for the recovery of goods in specie, or damages for detaining them; and this action [\*434] is the \*only remedy by suit at law for the recovery of a personal chattel *in specie*, unless in those cases where the party can regain possession by replevin: 3 *Bl. Com.* 146, 152; *Willes*, 120; *Ob. D. Detinue, A. F. N. B.* 138. It has been supposed it does not lie for goods *tortiously* obtained by deft.: see 3 *Bl. Com.* 152; *sed vide Sir W. Jones*, 173; *Mod.* 122; 1 *Chit. Pl.* 112. The gist of the action is the wrongful detainer, and not the original taking: 3 *Bl. Com.* 132. The goods sought to be recovered must be capable of being identified by some means: thus, it does not lie for money unless in a bag: *Co. Lit.* 286, b.; *Com. D. Detinue, B. C.* It lies for title-deeds and charters, 2 *Saund.* 47, a., *Com. D. Detinue, A.* It does not lie for real property, *Cro. J.* 39. The plt. must have the same title in the property to support this action as he needs have in trover: *see post*, "*Trover*," and *Phillips v. Robinson*, 12 *Moo. Rep.* 308.

Debt and detinue may be joined in the same declaration, 2 *Saund.* 117, b., *Bro. Joinder in Actions*, 97; and, in some cases, this renders detinue a very advantageous form of remedy. Thus, when a deft. has in his possession personal property formerly of the plt., and it be doubtful whether a contract by the deft. for the purchase thereof can be proved, it is advisable to insert a count in debt for goods sold, and another count in detinue, that the plt. may recover on one ground or the other: *see 2 Chit. Pl.* 594, n. a.

*Form of Pleadings.*

*Declaration.*] The venue is transitory: *Com. D. Action n. 6.* The day stating the delivery to deft. is immaterial. Much certainty and accuracy are necessary in the description of the things demanded, and greater than in trover or replevin: 2 *Saund.* 74, a. b.; *Kettle v. Bromsall, Willes*, 120. It is unnecessary, however, to state the date of the deed: 1 *Wils.* 116. Where the action is for several articles, the value of each need not be stated separately in the declaration, though the jury should sever the value of each by their verdict: 2 *W. Bl. R.* 853; *S. N. P.* 670; *Com. D. Pleader*, 2 X. 2. The contract of bailment, if any, should be truly stated. Where there has been a special bailment, it is proper to declare in one count, at least, on the bailment, 1 *N. R.* 146, and to state a special request to redeliver: *Willes*, 120; 5 *T. R.* 409. In other cases, it is sufficient, however, to declare upon the supposed finding, which is not traversable: *Doc. Pl.* 124. It seems an averment of a special request

to redeliver is necessary: *Willes*, 118; 5 *T. R.* 409. Sufficient damages should be inserted to cover the real value of the goods: *Cro. J.* 628; *Com. D. Pleader*, 2 *X.* 12.

The general issue in detinue is *non detinet*, and under which the deft. may bring evidence of a gift from the plt., or any other defence which proves that the deft. does not detain the plt.'s goods; but the deft. must plead specially that the goods were pawned to him for money remaining unpaid: *Co. Lit.* 283. A lien must also be pleaded specially: 1 *Chif. Pl.* 113.

### Precedents.

#### COMMENCEMENT OF DECLARATION IN K. B.

Ellenborough.

— Term, 9 Geo. 4.

(*venue*) to wit. A. B. complains of C. D., being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said A. B. certain goods and chattels (or, "deeds and writings," according to the fact), of great value, to wit, of the value of £—, of lawful, &c., which he unjustly detains from him, for that, &c.

#### THE LIKE IN C. P.

In C. P. the form runs: "C. D. was summoned to answer A. B. of a plea, that he render to the said A. B. certain goods and chattels, (or, "deeds and writings"), of great value, to wit, &c., which he unjustly detains from him; and thereupon the said A. B., by E. F., his attorney, complains against the said C. D., for that whereas, &c."

#### DECLARATION IN DETINUE ON A BAILMENT TO REDELIVER ON REQUEST.

\*For that whereas the said plt., heretofore to wit, on (any day), &c., at (venue), &c., delivered to the said deft. certain goods and chattels, to wit, &c. (*describes the property fully*), of the said plt., of great value, to wit, of the value of £— (*insert enough*), of lawful money of, &c., to be redelivered by the said deft. to the said plt., when he, the said deft., should be thereunto afterwards requested. Yet the said deft., although he was afterwards, to wit, on, &c., aforesaid, at, &c. aforesaid, requested by the said plt. so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said plt., but hath hitherto wholly neglected and refused, and still doth neglect and refuse, so to do, and still unjustly detains the same from the said plt., to wit, at, &c., aforesaid. And whereas, also, the said plt., heretofore, to wit, on, &c., aforesaid, at, &c., aforesaid, was lawfully possessed of certain other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, as of his own property; and, being so possessed thereof, he, the said plt., afterwards, to wit, on, &c., aforesaid, at, &c. aforesaid, casually lost the said last-mentioned goods and chattels out of his possession; and the same afterwards, to wit, on, &c., aforesaid, at, &c. aforesaid, came to the possession of the said deft. by finding. Yet the said deft., well knowing the said last-mentioned goods and chattels to be the property of him, the said plt., and of right to belong and appertain to him, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the said plt., although often requested so to do, but hath hitherto wholly refused so to do, and hath detained, and still doth detain, the same from the said plt., to wit, at, &c., aforesaid, to the damage of the said plt. of £—; and therefore he brings his suit, &c.

#### THE LIKE OF DEBT AND DETINUE IN THE SAME DECLARATION.

— to wit. A. B. complains of C. D., being, &c., of a plea, that he render to the said A. B. the sum of £—, of lawful, &c., which he owes to, and unjustly detains from him; and also that he render to him, the said A. B., certain goods and chattels (*according to the fact*), of him, the said A. B., which he unjustly detains from him, for that whereas (*here insert the counts in debt, and the conclusion, to the words "to the damage," &c.; and then insert the counts in detinue for the chattels, &c. as in the preceding precedent, to the end, and conclude, "to the damage," &c.*)



## GENERAL ISSUE, NON DETINUE.

In the K. B. (or C. P., or Excq.) — Term, 9 Geo. 4.  
 C. D.) And the said deft., by —, his attorney, comes and defends the wrong and in-  
 ats. } jury, when, &c., and saith that he doth not detain the said goods and chattels (ac-  
 A. B.) } cording to the facts) in the said declaration specified, or any part thereof, in manner  
 and form as the said plt. hath above thereof complained against him; and of this he, the said  
 deft. puts himself upon the country, &c.

*Evidence.*

The plt. must prove, 1st, his property in the goods; and, 2d, the detainer by the deft.

1. As to the proof of property in the goods. The evidence is similar to that in trover; and any person, who has the absolute or general property in goods, and the right to immediate possession, may support this action: see *post*, "*Trover*." An heir may, therefore, support this action for an heir-loom, *Bro. Ab. Detinue*, pl. 30; and, where A. delivers goods to B., to deliver them to C., the latter may support detinue against B.; for the property is vested in him, by the delivering to B. for his use: 1 *Rol. Ab.* 606. But, if there be no immediate right of possession, and plt.'s interest be in reversion, he cannot support detinue: *Gordon v. Harper*, 7 *T. R.* 9; *Pain v. Whittaker*, *R. & M.* 100. So, it may be supported by one who had the special property; as, a bailee, &c. Title-

deeds go with the estate; and, if the plt., having deposited [\*436] them with deft., assign his \*interest or estate, he cannot sue: 4 *Bing.* 106. If a person detain the goods of a *feme covert*, which came to his hands before the marriage, the husband alone may maintain detinue, because the law transfers the property to him, and the detainer is the cause of action: *B. N. P.* 50. Where A. delivers goods to B., who loses them, and D. finds them, and delivers them to J. S., who has a right to them, A. cannot maintain detinue against D.; for he is not privy to the delivery by A.: 2 *Danv.* 511; *B. N. P.* 51.

*Detainer by Defendant.*] The plt. must prove an actual possession of the goods by the deft., 2 *Rol. Ab.* 703; *Wilkins v. Despard*, 5 *T. R.* 112; as the gist of this action is the wrongful detainer, and not the original taking: 3 *Bla. Com.* 152. Therefore, *detinue* cannot be supported against the executor of a bailee, if it appear in evidence that he has destroyed the chattel, *B. N. P.* 50; and, where there are several executors, and one only has possession, the plt. will be nonsuited, unless it be against him alone: *Bro. Ab. Detinue*, pl. 19. In detinue for a bond for £100 upon bailment, if deft. plead that he did not receive a bond for such, and it is found that he received a bond for a greater sum, there must be a verdict for the deft.; because the bond is not the same as that which the plt. demands: 2 *Rol. Ab.* 703; see, further, *post*, "*Trover*."

*Damages, Value, &c.*] The language of the judgment being in the alternative, that the plt. do recover the goods or the value thereof, it is incumbent on the jury to find the value of every particular thing demanded; and, if they give damages and costs, and no value, the defect cannot be supplied by a writ of inquiry: *Cheney's case*, 10 *Rep.* 119; 1 *Selw. N. P.* 670; *post*, "*Trover*."

## DEVISE.

See "EJECTMENT BY DEVISEE," 458.



## DISCLAIMER.

See "EJECTMENT BY DEVISEE," 458.



## DISTRESS, ILLEGAL.

FORM OF REMEDY FOR, 437.

FORM OF PLEADINGS, 438.

PRECEDENTS, *ib.*EVIDENCE FOR PLAINTIFF, *in general*, 442.

*In case for Distress, for Excessive Distress, 443.—For not selling at best price, ib.—For not removing the Goods after five Days, ib.—For selling Distress within five Days, ib.—For Distraining Beasts of Plough, ib.—For refusing to restore Goods after Tender of Rent, &c., 444.*

*Form of Remedy.*

[\*437]

By the common, law any irregularity committed in the proceedings of a distress rendered the party a trespasser *ab initio*; and it is still so in distresses for damage feasant. But, in the case of a distress for rent, the law has been entirely changed by 11 G. 2, c. 19, which enacts that a subsequent irregularity will not render the party a trespasser *ab initio*, or subject him to an action of trespass or trover: and case is the proper remedy in these and most other instances of irregularity, in the taking, or sale, or disposal of a distress: *Wallace v. King*, 1 H. Bl. 13. Trespass or trover is a proper form in all cases where the distress is *wholly* illegal, *Etherton v. Popplewell*, 1 East, 139, and where there has been an excessive distress, if it appear upon the face of the record to be so very excessive, that the distrainer must be considered as a trespasser for taking it: as, in distraining six ounces of gold and a hundred ounces of silver for the sum of 6s. 8d.; for here the excess was not only palpable, but specific: *Crowther v. Ramsbottom*, 7 T. R. 658. So, if an excessive distress be abused, that is a separate cause of action, *Lynne v. Woody*, 2 Str. 851; or, if to such distress be added any other distinct trespass, as that of turning the plt. out of his house, for such additional act an action of trespass will lie: *Etherton v. Popplewell*, 1 East, 139. But, in general, the remedy to be pursued for an excessive distress must now be wholly founded on the statute of 52 H. 2, c. 4, 3 Lev. 48, 2 Inst. 104, 131, 2 Str. 851; and trespass or trover are not in general maintainable for it. For driving or impounding of a distress contrary to the directions of the stat. 1 and 2 Ph. & M. c. 12, the remedy must be on that act; for, where, in an action of trespass brought for taking of cattle, in which the deft. pleaded damage feasant and an impounding

within three miles, and the plt. replied that the impounding was in another county, the court held it a departure, because the declaration was founded upon the common law, and the replication upon a statute; observing that, it being a statutory offence, the plt. ought to have brought his action upon the statute: 3 *Lev.* 48. And, in a later case, where, on a justification for impounding cattle damage feasant, it appeared that the impounding was in another county, the court held that it did not make the distrainer a trespasser *ab initio*, although it subjected him to the penalties of the statute: *Gimbart v. Pelah*, 2 *Str.* 1272. Case does not lie for detaining cattle distrained damage feasant, where tender of sufficient amends was made after the cattle had been impounded: *Sheriff v. James*, 1 *Bing.* 341. An indictment or information will not lie for an excessive distress: *Rez v. Lesingham*, 1 *Lev.* 299; 1 *Ld. Raym.* 193, *s.c.*

The plt. has frequently the option of declaring in case or trespass. Thus where a distress has been made for rent, and there is no rent due, trespass or case may be supported on the 2 *W. & M. c.* 5; and so, where a distress is made after a tender of the rent, and there has been no subsequent demand: *Branscomb v. Bridges*, 1 *B. & C.* 145; 2 *D. & R.* 256, *s.c.*; 3 *Stark.* 171, *s.c.* So, if the party turn the plt. out of possession, or continue in possession an unreasonable time, more than five days, trespass or case lies, *Etherton v. Popplewell*, 1 *East*, 139, *Winterbourne v. Morgan*, 11 *East*, 395, *Messing v. Kemble*, 2 *Camp.* 115, *Pitt v. Shew*, 4 *B. & A.* 208; so, where a party taking a distress, damage feasant, has been guilty of any irregularity, making him a trespasser *ab initio*: 8 *Co.* 146; *Bac. Ab. Trespass, B.* The proprietor of cattle, wrongfully distrained damage feasant, who has paid money for the purpose of having them redelivered to him, cannot recover back that money in an action of assumpsit; because such mode of proceeding would impose great difficulties on the deft., by not apprising him of what he was to defend: he should sue in trespass, replevin, or trover: *Lin- [438] don v. Hooper*, *Cowp.* 414; *\*Shipwick v. Blanchard*, 6 *T. R.* 298. The person whose goods, however, are wrongfully distrained may pay the sum demanded, in order to redeem his goods; and, after they are in his possession, bring trover against the distrainer for the unlawful taking: *ib.*

### *Form of Pleadings.*

The general rules as to declarations in trespass or case will here apply: see those titles. The venue is transitory. In an action on the case of an illegal or irregular distress, the particular grievance is specified in the declaration, according to the nature of the facts. In an action on the case for the illegal distress, it seems to be sufficient to allege in the declaration that the distress was made for rent supposed to be due upon a certain demise before then made by the deft. to the plt., without specifying the particulars of the demise itself, and to state generally that it was taken for and in the name of a distress, without adding for rent arrear: *Solter v. Brunsden*, 4 *Mod.* 231. The declaration in general avers a certain sum as due for rent; but proof as to the precise sum is unnecessary: *Sells v. Hoare*, 1 *Bing.* 401. A variance in the description of the premises would be fatal: 2 *Moo.* 587. On the 51 *H. 3, c. 4*, for

distraining beasts of the plough, and the declaration need not show that there was a sufficient distress of other goods: *Dyer*, 312; *Sid.* 348. Where the plt. declared on 2 *P. & M. c.* 12, for a distress taken in a hundred in one county, and driven six miles out of the county, without averring that it was more than three miles from the hundred in which the taking was, even after verdict, the judgment seems to have been arrested, upon the ground of its not necessarily appearing to be an offence within the statute; because the hundred might have have extended into both counties: *Anon. Godbolt*, 11. In declaring on 51 *H. 3, s. 4*, in an action on this statute, it is necessary to show upon the face of the record that the distress is excessive; for otherwise it does not sufficiently appear to the court to be a case within the act: *Rex v. Ledgingham*, 1 *Mod.* 288. The declaration for taking a distress for more rent than was due should be framed on the common law. If the distress was excessive, it should be framed on the 52 *H. 3, c. 4*; *Lynne v. Moody*, 2 *Str.* 851; *Woodcroft v. Thompson*, 3 *Lev.* 48. In declaring on the equity of the 2 *W. & M. c. 5*, for selling the distress within the five days, it is not necessary to aver that deft. gave notice of the taking: *Lutw.* 214.

### Precedents.

#### FOR DISTRAINING FOR MORE RENT THAN WAS DUE.

For that whereas the said plt., before and at the time of the committing of the grievance hereinafter next mentioned, held and occupied certain premises, with the appurtenances, situate and being in the county of ———, as tenant thereof to the said deft. (or E. F.), at and under a certain rent, therefore payable by the said plt. to the said deft. (or E. F.), to wit, at (venue). Yet the said deft., contriving and intending wrongfully and unjustly to injure and aggrieve the said plt. in this behalf, heretofore, to wit, on, &c. (day of taking, or about it), at, &c., aforesaid (venue), falsely and maliciously pretending that a certain large sum of money, to wit, the sum of £——, of lawful money, &c., was then due and in arrear from the said plt. to the said deft. (or E. F.), for rent of the said premises, with the appurtenances, wrongfully and unjustly seized and took certain goods and chattels, to wit, &c., (enumerate them as in trover), of the said plt., then found and being in and upon the said premises, of great value, to wit, of the value of £——, (insert enough), of lawful money of Great Britain, as a distress for the said sum of money so pretended to be due and in arrear as aforesaid, and, under that pretence, kept and detained the said goods and \*chattels [439] of the said plt., from him, the said plt., for a long space of time, to wit, for the space of — days then next following, and until he, the said plt., in order to regain the possession of his said goods and chattels, was forced and obliged to pay, and did pay, to the said deft. (or E. F.) the said pretended arrears of rent, and a large sum of money, to wit, the sum of £——, for the costs and charges of the said distress, and expenses incidental thereto (according to the fact. If they be still detained, say, "for a long time, to wit, from thence hitherto.") Whereas, in truth and in fact, at the time of the making of the said distress, as aforesaid, and during all the time aforesaid, a small part only, to wit, the sum of £——, of the said sum of money so pretended to be due and in arrear, as aforesaid, was due and in arrear from the said plt. to the said deft. (or E. F.), for the rent of the said premises, with the appurtenances, to wit, at, &c., aforesaid (venue.) (Add a count for an excessive distress, as in the next precedent, and a count in trover.)

#### FOR TAKING AN EXCESSIVE DISTRESS FOR RENT, ON STAT. MARLB. 52 H. 3. C. 4.

For that whereas the said plt., before and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed certain premises, with the appurtenances, situate in the county of ———, as tenant thereof to the said deft., at and under a certain rent therefore payable to the said deft. (or E. F.) for the same; of which said rent, at the time of the committing of the grievance hereinafter next mentioned, a certain small sum of money, to wit, the sum of £——, and no more, was due and in arrear to the said deft. Yet the said deft., not regarding the statute in such case made and provided, but wrongfully and maliciously contriving and intending to injure and oppress the said plt. in this behalf, heretofore,

to wit, on, &c. (*day of taking, or about it*), at, &c., aforesaid (*venue*), wrongfully and maliciously took and distrained for the said arrears of rent, certain goods and chattels, to wit, &c. (*enumerate them as in trover*), of the said plt., of much greater value than the amount of the said arrears of rent, to wit, of the value of £—, and thereby took a great and unreasonable distress for the said arrears of rent, when, at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distrained, as aforesaid, to wit, one half thereof, then was of sufficient value to have satisfied the said arrears of rent, and the charges of the said distress, and of the appraisement and sale thereof, to wit, at, &c., aforesaid, contrary to the form of the statute in such case made and provided. (*Add a count in trover.*)

ON 2 W. & M., SESS. 1, C. 5, S. 5, WHERE NO RENT WAS DUE.

For that whereas the said plt., before and at the time of the committing of the grievance by the said defts., as hereinafter next mentioned, held and enjoyed a certain messuage and premises, with the appurtenances, situate in the county of —, as tenant thereof to the said deft. (or E. F.), at and under a certain rent therefore payable by the said plt. to the said deft. (or E. F.) Yet the said deft., not regarding the statute in such case made and provided, but contriving wrongfully and injuriously intending to harass, oppress, and injure the said plt. in this behalf, heretofore, to wit, on, &c. (*the day of taking, or about it*), at, &c. (*venue*), by colour of a certain act of Parliament, entitled, "An Act for enabling the Sale of Goods distrained for Rent, in Case the rent be not paid in a reasonable Time," wrongfully and injuriously seized, took, and distrained in and upon the said premises, with the appurtenances, divers goods and chattels of the said plt., to wit (*here enumerate the goods taken*), of great value, to wit, of the value of £—, (*insert enough*), and afterwards, to wit, on the — day of — (*the precise day is immaterial*), at, &c. (*venue*), sold the said goods and chattels as such distress, as aforesaid, by colour of the said act, for certain rent, to wit, the sum of £—, then and there pretended by the said deft. to be in arrear and due to the said deft., for the said demised premises, with the appurtenances. Whereas, in truth and in fact, at the time of the making of the said distress and the said sale, as aforesaid, no rent was in arrear or due to the said deft. for, or in respect of, the said premises, with the appurtenances, contrary to the form of the statute in that case made and provided. (*Add a count in trover, post, "Trover."*)

FOR NOT RESTORING GOODS ON TENDER OF THE RENT AND COSTS.

[\*440] For that whereas the said deft., heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c. (*venue*), had taken and distrained divers goods and chattels, to wit, &c., of the said plt., of great value, to wit, of the value of £—, there then found and being, as and for, and in the name of, a distress for certain rent, to wit, the sum of £—, then due and in arrear from the said plt. to the said deft. (or E. F.), for and in respect of certain premises, with the appurtenances, before then held and occupied by the said plt., as tenant thereof to the said deft. (or E. F.); and thereupon, afterwards, and whilst the said deft. was in possession of the said last-mentioned goods and chattels under such distress, as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, tendered and offered to the said deft. (or E. F.), in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said distress, a certain large sum of money, to wit, the sum of £—, the same being then and there a sufficient sum to satisfy and discharge the said arrears of rent, together with all the costs and charges of the said distress; and then and there requested the said deft. (or E. F.), to redeliver and restore the said goods and chattels to him, the said plt.; and, although the said deft. then and there ought to have accepted and received the said sum of money from the said plt., in discharge of such arrears of rent, and the costs and charges of the said distress, and to have redelivered and restored the said goods and chattels to him, the said plt., yet the said deft., contriving and wrongfully and unjustly intending to harass, oppress, and aggrieve the said plt. in this behalf, did not, nor would, when he was so requested, as aforesaid, or at any other time, accept or receive the said sum of money from the said plt., in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said last-mentioned distress, or redeliver or restore the said goods and chattels, or any part thereof, to the said plt., but then and there wholly neglected and refused so to do, and hath hitherto wrongfully and injuriously kept and withheld the said last-mentioned goods and chattels from the said plt., and hath converted and disposed thereof to his own use, to wit, at, &c., aforesaid. (*Add a count in trover.*)

FOR IMPOUNDING GOODS DISTRAINED OFF THE PREMISES, AND NOT GIVING THE TENANT NOTICE.

For that whereas the said deft., heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c., (*venue*), seized and took divers goods and chattels, to wit, &c. (*enumerate them, as in*

*trover*), of the said plt., of great value, to wit, of the value of £—, then found and being in certain premises, with the appurtenances, situate in the county of —, as for and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of £—, pretended to be due and in arrear to the said deft. for and in respect of the said premises, with the appurtenances; and then and there carried away and removed the said goods and chattels, and impounded the same off the said premises, with the appurtenances. Nevertheless, the said deft., contriving and wrongfully and unjustly intending to injure the said plt., and not regarding the statute in such case made and provided, did not nor would give due and proper notice of the said distress, and of the cause of taking the same, or of the place to which the said goods and chattels were removed, to the said plt., or leave the same at the said premises, with the appurtenances, but wholly neglected so to do, and therein failed and made default, contrary to the form of the statute in such case made and provided. (*Add a count in trover.*)

**FOR NOT SELLING FOR THE BEST PRICE, ON THE EQUITY OF THE STAT. 2 W. & M. C. 5, S. 2.**

For that whereas, heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c. (*venue*), the said deft. seized and distrained divers goods and chattels, to wit, &c. (*enumerate them, as in trover*), of him, the said plt., of great value, to wit, of the value of £—, of lawful, &c. (*insert enough*), then found and being in and upon certain premises, with the appurtenances, situate in the county of —, as for and in the name of a distress for certain arrears of rent alleged to be due to the said deft. for the use and occupation of the said premises. And whereas, also, the said deft., afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, sold the said goods and chattels for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress; \*yet, the [\*441] said deft., not regarding his duty in making and selling the said distress, nor the statute in such case made and provided, but contriving and fraudulently intending craftily and subtly to injure the said plt. in that behalf; did not nor would sell the said goods and chattels under the said distress for the best price that could be gotten for the same, but, on the contrary thereof, the said deft. then and there, to wit, on, &c., aforesaid, wrongfully and injuriously sold the said goods and chattels for much less than the best price, to wit, for £— less than the best price which might have been gotten and received for the same, had the same been sold in a due and proper manner by the said deft., to wit, at, &c. (*venue*), aforesaid. (*Add a count in trover.*)

**FOR SELLING A DISTRESS WITHIN FIVE DAYS, ON 2 W. & M., C. 5.**

For that whereas the said deft., heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c., seized and took divers goods and chattels, to wit, &c. (*enumerate them, as in trover*), of the said plt., of great value, to wit, of the value of £— (*insert enough*), then found and being in and upon certain premises, situate, &c., in the name of a distress for certain arrears of rent, pretended to be due and payable for the same to him, the said deft. (or E. F.), and then and there gave notice thereof to the said plt. Yet the said deft., not regarding the statute in such case made and provided, and contriving and wrongfully and unjustly intending to injure the said plt. in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit, and advantage thereof, and to prevent him from replevying the same afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given, as aforesaid, to wit, within the space of five days thence next following, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, wrongfully, unlawfully, and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will, of the said plt., whereby he, the said plt., was not only hindered and prevented from replevying the said goods and chattels so distrained, as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed by law, for the raising, obtaining, and procuring money to pay and discharge the rent so pretended to be due and in arrear, as aforesaid, and the costs of the said distress; and the said plt. hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*), aforesaid.

**FOR NOT REMOVING GOODS DISTRAINED WITHIN A REASONABLE TIME AFTER THE FIVE DAYS.**

For that whereas the said deft., heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c. (*venue*), seized and took divers goods and chattels, to wit, &c. (*enumerate them, as in trover*), of the said plt., of great value, to wit, of the value of £— (*insert enough*), then found and being in and upon certain premises of the said plt., situate in the county of —, in the name of a distress for certain arrears of rent pretended to be due and payable for the same to him, the said deft., or (E. F.), and then and there gave notice thereof to the said plt. Yet the said deft., not regarding the statute in such case made and provided, but contriving and wrongfully and unjustly intending to injure the said plt. in this behalf, did not nor would remove the said goods and chattels from the said premises within a reasonable time

after the expiration of five days next after the making of the said last-mentioned distress, and giving the said notice thereof; as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the license or consent, and against the will, of the said plt., kept and detained the said goods and chattels in and upon the said premises, for a great and unreasonable space of time after the expiration of the said five days, as aforesaid, to wit, for the space of — then next following, contrary to the form of the statute in such case made and provided, to wit, at, &c. (*venue*), aforesaid.

ON 2 W. & M. C-5, s. 2. FOR NOT LEAVING OVERPLUS OF SALE WITH SHERIFF, &c.

For that whereas, heretofore, to wit, on, &c. (*day of taking, or about it*), at, &c., the said deft. seized and distrained divers goods and chattels, to wit, &c. (*enumerate them, as in trover*), of him, the said plt., of great value, to wit, of the value of £—, of lawful, &c., there then found and being in and upon certain premises, with the appurtenances, situate in the "county of —", as and for and in the name of a distress for certain arrears of rent alleged to be due to the said deft. (or E. F.), for and in respect of the said premises. And whereas, also, the said deft., having caused the said goods and chattels to be appraised, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, sold the same for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, appraisement, and sale, for divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £—, of lawful money of Great Britain, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said premises, with the appurtenances, and all the charges of the said distress, appraisement, and sale. And the said plt. further saith, that although the said deft., afterwards, to wit, on the day and year aforesaid, at, (*venue*), out of, and with a part of the produce of, the said goods and chattels so by him sold, as aforesaid, satisfied the said rent, for which the said goods and chattels were so distrained, as aforesaid, and the charges of the said distress, appraisement, and sale, leaving a great and considerable overplus of the money produced by the said sale, yet the said deft., not regarding his duty in that behalf, nor the statute in such case made and provided, but contriving and fraudulently intending to deceive and defraud the said plt. in this behalf, did not, after satisfaction of the rent, for which the said goods and chattels were so distrained, as aforesaid, and of the charges of the said distress, appraisement, and sale, out of the produce of the said goods and chattels so sold, as aforesaid, leave the overplus thereof in the hands of the sheriff or undersheriff, of the said county of —, or either of them, or of the constable of the parish, hundred, or place, where the said distress was so taken, as aforesaid, for the use of the said plt., so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose hath long since elapsed; but the said deft. hath hitherto wholly neglected and refused so to do, and therein wholly failed and made default, and he, the said plt., hath not yet received or been in any way satisfied for such overplus, as aforesaid, contrary to the form of the statute in such case made and provided, to wit, at, &c., aforesaid.

See other precedents for distraining beasts of the plough, 2 *Chit. Pl.* 718; for driving the distress out of the hundred, *ib.* 721; for selling goods within the five days, *ib.* 724; for misusing a distress, *ib.* 678. See, also, form in trespass for taking a distress, *ib.* 859.

### Evidence.

In *general* the plt. will have to prove the taking of the goods, that they were his property, their value, and the illegal act complained of, with the consequent damages. It is usually unnecessary to prove the precise terms of the tenancy, as it is sufficient to prove the goods were taken under colour of a distress: *Com. D. Distress, D. 9*. In some cases, however, as where the amount of the rent is in dispute, evidence of the terms of the tenancy should be adduced. If the local situation of the premises be stated, it must be proved as stated: 2 *Moo.* 587. The local situation of the premises may be proved by the collectors of the taxes or parish officers, or any other person acquainted with the boundaries of the parish, *Harris v. Cooke*, 2 *Moo.* 587; and, where the notice of distress is correct, it may be used as evidence of the tenancy, the amount of the rent, and the sum in arrear.

The facts of the *taking* are usually proved by the broker by whom the distress was made, if he has not been made a \*deft.; [\*443] if he has, the plt. must call some other witness, as one or more of his servants or family, or the broker's assistant. He should produce and show a copy of the notice of distress, and prove it to have been served on the plt., or left at his house and signed by the def., whose hand should be proved. The broker, if a def., should be served with a notice to produce his authority to distrain, and the service of this notice should be proved; if he be not a def., he should be subpoenaed to produce it. Any acknowledgment made by defs., or their assistants, should be proved: see *Admissions, ante*.

It may be as well to observe, that the defs. are not bound by the contents of the notice of distress, it being a rule of law, that the party may distrain for one thing, and avow or justify for another. Therefore, though the cause of the taking such, as the amount of the rent due, or time during which it became due, or when it became due, be incorrectly stated, it will be immaterial: *Crowther v. Rambottom*, 7 T. R. 658; 3 T. R. 645; *Dougl.* 279.

The action for taking an *excessive distress* for rent, on stat. 5 H. 3, c. 4, is sustainable, though there was a tender before distress made, 2 D. & R. 256, 4 ib. 539, 2 B. & C. 821; or though, between the distress and sale of the goods distrained, the parties came to an arrangement respecting the sale. Though the declaration aver a certain sum as due for rent, it is not necessary to prove the precise sum stated, but evidence must be given of what was actually due: *Sells v. Hoare*, 1 Bing. 401. It is not necessary to prove express malice; it should, however, be shown in evidence that the distress was excessive, *Field v. Mitchell*, 6 Esp. 71; as, if a man distrain two or three oxen for twelve pence, or if he distrain a horse or an oxen for a small sum, where a sheep or a pig might be taken. But, where there is only one thing which can be distrained, it is otherwise, *ib.* 72; and, therefore, it has been said that, even for a small demand, a cart and horse may be distrained, because they are not severable from each other: *Clarke v. Tucket*, 2 Vent. 183; *Bradby*, 276.

In an action for not *selling for the best price*, on the equity of stat. 2 W. & M., c. 5, s. 2, the plt. should prove distinctly that the goods were not sold for the best price; for, otherwise, the price at which the goods were appraised will be presumed to be the best: 4 Mod. 390. The original costs of the goods had better be proved, and some competent witness subpoenaed to show their value beyond the price for which they were sold: the price must be much less than the best price. No order is required to be observed upon the sale: *Jenner v. Yolland*, 6 Price, 5. It seems the def. could not be justified in selling the goods to the highest bidder much under their value: 3 Camp. 521; see 1 Stark. 43.

In an action for *not removing* goods distrained, within a reasonable time after the elapse of the five days, on the equity of the 2 W. & M., c. 5, s. 2, and 11 G. 2, c. 19, s. 10, it should be observed, that a reasonable time after the five days is allowed to the landlord for appraising and selling the goods, *Pitt v. Shew*, 4 B. & A. 208; and it is a question for the jury to say, what is a reasonable time. The five days are reckoned inclusive of the day of sale: 1 H. Bl. 13. By the consent of the tenant,



the landlord may continue in possession longer than the five days, without incurring any responsibility, 7 *Price*, 690; if such consent has been given expressly or impliedly, the debt. should be prepared to prove the same.

In an action for selling a distress within five days, on the equity of 2 *W. & M. c. 5, s. 2*, it should be observed, that such five days are reckoned inclusive of the day of sale; as, where goods are distrained on the first, they must not be sold before the sixth: *Wallace v. King*, 1 *H. Bl.* 13.

An action on the stat. of *Marl. 51, H. 3, s. 4*, for distraining beasts of the plough and sheep, there being other goods sufficient to distrain, cannot be supported, if there was reasonable ground for supposing that there was not a sufficient quantity to distrain without taking beasts, &c., 6 *Price*, 3, 2 *Chit. Rep.* 167; and the distrainer would not, in such case, be bound to sell other goods first: *ib.* And, if the distress be made for rent in arrear, and afterwards the tenant, in order to regain his beasts, tender, or even pay, to the lord the arrears, and thereby obtain [\*444] a deliverance of them, although, \*by such act, he may seem to have affirmed the distress, yet he may have his action against the stat.: 2 *Inst.* 113.

In an action for *refusing to restore goods distrained* for rent, on tender of the rent and costs, the tender should be strictly proved: see *post*, "*Tender*." It should be observed, that a tender of the rent upon the land, before the distress, makes the distress tortious; a tender after the distress, and after the impounding, makes the subsequent detainer, but not the taking, wrongful; a tender after the taking and impounding does not make either the one or the other wrongful; but, in the case of a distress for rent, a sale, after the tender of the rent and costs, is illegal, under the equity of the stat. 2 *W. & M., c. 5*. An action on the case will not lie for detaining the plt.'s cattle in the pound after tender of amends made subsequent to the impounding, *Anscomb v. Shore*, 1 *Camp.* 285, 1 *Taunt.* 261; nor where the tender is made after the distress, but before the impounding, for the proper action is replevin or trespass: *Lindon v. Hooper, Cowp.* 411; and see 6 *T. R.* 299.



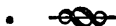
## DISTURBANCE.

See "NUISANCE," "COMMON," "WAY," "ANCIENT LIGHTS," &c.



## DIVORCE.

See "HUSBAND AND WIFE."



## DRUNKENNESS.

INTOXICATION is good evidence, upon a plea of *non est factum*, to a deed or *non concessit* to a grant, and upon *non assumpsit* to a promise,

*p. Ld. Ellenb., Pit v. Smith*, 3 *Camp.* 34, *B. N. P.* 172, *Fenton v. Holloway*, 1 *Stark.* 126. It appears to have been decided, that mere drunkenness was not sufficient to avoid an obligation, unless it had been effected through the management or contrivance of him who gained the deed: *Johnson v. Medlicott*, 3 *P. Wms.* 130; *Co. Lit.* 247; 1 *V. & B.* 30. See, however, the judgment of *Bayley, J.*, in *Bagster v. Earl of Portsmouth*, 7 *D. & R.* 614.



## DURESS.

*Form of Pleadings.*] In assumpsit, or debt on simple contract, deft. will be allowed to plead specially, or give in evidence under the general issue, that he was under duress: 5 *Co.* 119. But, in debt on bond, or other specialty, deft. must plead that matter specially: *ib.* 119, *a.*; *Com. D. Pleader*, 2 *W.* 19, 20; *B. N. P.* 171; 1 *Saund.* 103, *b.*; see *Precedents*, 2 *Chit. Pl.* 964, 5. A deft. who is a mere security to the bond, will not be permitted to plead the duress of his principal as a defence to the action on the bond, as the duress, to be a sufficient defence, must be of the person of the deft.: *Huscombe v. Standing*, *Cro. J.* 187.

By way of replication to the above plea, plt. may state that the deed \*was executed voluntarily, and not under menaces: [\*445] *Com. D. Pleader*, 2 *W.* 19, 20; see *Form*, 2 *Chit. Pl.* 1172; *Atk. Appx.* 77.

*Evidence.*

To support a plea of duress, &c., where it is by imprisonment, it must appear that the imprisonment was unlawful, and not by virtue of legal process; and, therefore, where a deft., after judgment against him, without any legal cause of action, procured the plt. to be arrested on legal process, and threatened that he should lie in gaol unless he executed a release, upon which the party executed one, and was discharged, it was held, that the release could not be avoided by duress, *Lev.* 69, 4 *Inst.* 47; but, though the imprisonment be lawful, if illegal force be used, or the party be made to endure unnecessary privation or hardship, it will constitute a duress: 2 *Inst.* 482; *Williams v. Brown*, 3 *B. & P.* 69; *the King v. Southerton*, 6 *East*, 140; *Pole v. Harrobin*, 9 *East*, 417, *n.* Where the duress is by threats, it must be proved to have been so severe and violent, as that it would be sufficient to intimidate a man of moderate firmness, *Com. D. Pleader*, 2 *W.* 19, 1 *S. N. P.* 552; but it seems that a menace of a mere battery or trespass to lands is insufficient: 11 *Mod.* 201; *B. N. P.* 173; *Bac. Ab. Duress*. It must be duress to the person, and not the party's goods, *ib.*; duress by the party who enters into the contract: *Bac. Ab. Duress, B.*



## DYING DECLARATIONS.

See "ADMISSIONS," "PEDIGREE," &c.

## ECCLESIASTICAL COURT, SENTENCES OF.

*Effect of, in Evidence.*] The coñusance of the right of marriages belonging to the Ecclesiastical Court, faith and credit will be given to their proceedings; so, the sentence of an ecclesiastical court will be received in a court of common law as evidence in a case of marriage to prove a party legitimate, *Banting's case*, 4 Co. 29, 7 *ib.* 41; or to prove a marriage a nullity, *Cleeve v. Bathurst*, 2 Str. 960, *Dacosta v. Villa Real*, *ib.* 961, *Jones v. Bow*, Carth. 225; and *p. Holt, C. J.*, "A matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary;" but that is to be intended only in the point directly tried, and otherwise it is, if a collateral matter be collected or inferred from their sentence: *Blacham's case*, 1 Salk. 290. So proceedings in a spiritual court against a father, for incontinency with the mother, could not be given in evidence against a child of the marriage, claiming by descent from the father, *Hilliard v. Phaley*, 8 Mod. 180, *Robins v. Cruchley*, 2 Wils. 124; nor are letters of administration, granted by an ecclesiastical court, evidence of a fact merely to be inferred from them, as the death of the party: *Thompson v. Donaldson*, 3 Esp. Rep. 63; *Allen v. Dundas*, 3 T. R. 130. The subject of the sentence must appear to have been within the jurisdiction of the Spiritual Court, or it will not be admissible in evidence: *Sty.* 10; *Betsworth v. Betsworth*, 12 Vin. Ab. 128; *Phillips v. Crawley*, Freem. 84, pl. 103; *Allen v. Dundas*, 3 T. R. 130. The validity of a will may also be established by the judgment of an ecclesiastical court, *Noel v.*

*Wells*, 1 Lev. 235; and after such a sentence, evidence will [\*446] not be admitted in a \*court of temporal jurisdiction, to show that the will was forged, or that the person making it was a lunatic: *ib.* So, a probate granted by the Ecclesiastical court is conclusive against the world, *Allen v. Dundas*, 3 T. R. 125; except the jurisdiction of the court be denied, as where there were no *bono notabilia* within its jurisdiction, *B. N. P.* 247; or that the letters of administration have been revoked, *ib.*; or the seal of the ordinary may be proved to have been forged: *Noel v. Wells*, 1 Lev. 236.

*Proof of Sentence of.*] The sentence of the Ecclesiastical Court may be proved by the seal of the court, which is sufficient evidence of its proceedings: *Kempton v. Cross*, R. T. Hard. 108. And, where the probate of a will, bearing the seal of the court, has been lost, a second probate will not be granted; but the court will exemplify the first, and such exemplifications have been allowed to be given in evidence: *Shepherd v. Shorthose*, 1 Str. 412. So, the certificate, in the usual way of the Ecclesiastical Court, that administration has been granted, is evidence, *B. N. P.* 246, 1 Lev. 25; or the book of the court, in which the order, granting administration, is entered, *Elden v. Keddell*, 8 East, 187, *Bac. Ab. Ev. F.* 631, *Davis v. Williams*, 13 East, 232, *Hay v. Clark*, *ib.* 238; or the act of the court, endorsed upon the will, is sufficient evidence: *Doe v. Barnard*, Cowp. 295. The revocation of a will may also be proved by the entry in the book of the Prerogative Court: *B. N. P.* 246. Where notice was given to defts. to produce the

probate of their testator's will, and they refused, it was held, that a document, purporting to be the original will, and produced by an officer of the Ecclesiastical Court, under the seal of the court, was admissible as secondary evidence, to show that their testator had acknowledged therein that he had received money in his lifetime for the use of the plt.: *Gorton v. Dyson*, 3 Moo. 558; 1 B. & B. 219, s. c.



## EJECTMENT.

NATURE OF REMEDY, AND WHEN IT LIES, 447.

FORM OF PLEADINGS, *ib.*—*Declaration*, *ib.*—*Notice to Appear*, 451.  
—*Plea*, *ib.*

PRECEDENTS, 452.

EVIDENCE FOR PLAINTIFF, 454.

*In General, ib.*—*Legal Title, ib.*—*Proof actual Entry*, 445.  
—*Identity of Premises, and Deft.'s Possession*, 456.—*Actual Ouster, ib.*—*Damages, ib.*

*In Particular, in Actions by Heirs*, 457.

*by Devisees*, 458.

*by Trustees*, 460.

*by Personal Representatives*, 460.

*by Assignees of Bankrupt*, 461.

*by Copyholders, or Assignee of, ib.*

*by Joint-Tenants, &c.* 462.

*by Parson, ib.*

*by Guardian, ib.*

*by Tenant by Elegit*, 463.

*by Conusee of Statute Merchant, ib.*

*by Landlord, ib.*

*by Assignee of Reversion*, 473.

*by Mortgagee, ib.*

*by Lord of Manor, ib.*

\*EVIDENCE FOR DEFENDANT, *in General*, 474.

[\*447]

*Discontinuance*, 474.—*Descent Cast*, 475.—*Statute of Limitations*, 476.

COMPETENCY OF WITNESSES, 477.

*Nature of Remedy, and when it lies.*

EJECTMENT is a mixed action, and the form of remedy by which a person is entitled to recover the possession of real property, either in fee, fee-tail for life or for years: *S. N. P.* 692. This, and trespass, is the only form to recover the rents and profits of premises, when the occupation is adverse: 1 *T. R.* 386; 2 *Ld. Raym.* 1216. This action does not lie where the thing to be recovered is incorporeal, 3 *Bl. Com.* 206; yet it will lie for a common appendant or appurtenant, *Newman v. Holdingfast*, *Str.* 54. *Bull. N. P.* 99; and, by stat. 32 *H.* 8, c. 7, s. 7,

where tithes are appropriated, they may be recovered in ejectment: 2 *Saund.* 304, *a.* This action cannot be maintained where the thing to be recovered cannot be delivered in execution, and whereon an entry cannot be made: *B. N. P.* 99, *a.* So, it will not lie for a water-course, but the ground over which the water passes, being deliverable in execution, upon which an entry can be effected, may be recovered in this action: *Chalenor v. Thomas, Yelv.* 143. So a coal-mine, *Comyn v. Kinets, Cro. J.*, 150, *Noy*, 121, or a boilary of salt: *Smith v. Barret, Sid.* 161; 1 *Lev.* 114, *s. c.* A church may be recovered in this action, *Hillingsworth v. Brewster, Salk.* 256; and in *R. v. Old Arlesford, Ashurst, J.*, says, "There is no doubt but a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment;" though former cases have held the contrary, *Molineux v. Molineux, Cro. J.* 144, *Herbert v. Laughlyn, Cro. C.* 492, *Waddy v. Newton*, 8 *Mod.* 275; and, subject to a public easement, the owner of soil may maintain this action for land which is part of the king's highway: *Goodtitle d. Chester v. Atter, Burr.* 133, 145. Persons entitled to the first grass or aftermath are so far considered the owners of the land on which such right exists, as to enable them to maintain this action, *Ward v. Petifor, Cro. C.* 362, *R. v. Inhab. of Stoke*, 2 *T. R.* 451; and so for herbage: *Wheeler v. Toulson, Hard.* 330. But, in these cases, the action should be brought for the profits of the soil, and not for the soil itself, *ib.*; and so for the pasture of an hundred sheep, *Anon.* 2 *Dal.* 95; and for a cattle-gate: *Barnes v. Paterson, Str.* 1063; *Bennington v. Goodtitle, ib.* 1084.

The necessary title to the premises to support the action will be found, *post*, 454, 5. The party (plt.'s lessor) must have an exclusive right of entry and possession; and such right of possession must be of some duration: 2 *East*, 190; 11 *East*, 345. As to what will take away this right of entry, see *Adams*, 35; *post*, 474. He must have a strict legal title—a mere equitable one is not sufficient; he must also be able to recover on the strength of his own title, and not merely on the insufficiency of his opponents: 7 *T. R.* 43; 4 *Burr.* 2487; 5 *T. R.* 110, *n.* 1; 1 *East*, 246; *Adams*, 33; 1 *Chit. Pl.* 173, 4; *post*, 454. As to when an actual entry is necessary, see *post*, 455.

### Form of Pleadings.

**DECLARATION.]** The declaration, from the peculiar mode of proceeding in this action, may be considered as a kind of writ or process: see *Strange*, 507. It is most usual to frame it as if the proceedings were by original; but in the K. B. they may be framed as if they were by will.

**Title of Term.]** This should be of the term immediately preceding the vacation in which the declaration is delivered; but a mistake or omission in this respect is immaterial, as the consent-rule precludes the deft. from taking any advantage of a defect in it: *post*.

**Venue.]** This is local, and must be in the county where the premises are situate: 6 *Mod.* 222; *Cowp.* 161, 176.

**Statement of Demise, by whom.]** The demise itself is merely fictitious; but it must, nevertheless, be consistent with the title of the lessor

of the plaintiff; as, where the declaration stated the demise to be joint when it was several, it was held bad: *King v. Berry*, *Poph.* 57; *Tuport's case*, 6 *Co.* 15, *b.* So, where the demise was laid as joint, when it was made by tenants in common, it was bad; because tenants in common cannot make a joint demise, their estates being several and distinct, and no privity existing between them: *Moor v. Fursden*, 1 *Show.* 342; *Heatherly v. Weston*, 2 *Wils.* 232. Joint-tenants, or parceners, may declare upon a joint demise, because they are seized *per mie et per tout*, and derive their estates from one and the same title, *Millener v. Robinson*, *Moo.* 682, *Boner v. Juner*, 1 *Ld. Raym.* 726, *Morris v. Barry*, 1 *Wils.* 1; or several demises may be alleged from each, because the plt. has, by the several demises of each, the entire interest in the whole subject, and the several letting to the plt. having reversed the joint tenancy, there is, therefore, no incongruity in his recovering," *p. Ld. Ellenb. Doe d. Morsack v. Read*, 12 *East*, 61, *Roe d. Ruper v. Lonsdale*, *ib.* 39, *Doe d. Gill v. Pearson*, 6 *ib.* 182, *Doe d. Leelham v. Fenn*, 3 *Camp.* 190; and it may be stated to be a demise of the whole premises by each joint-tenant: *ib.* But where tenants in common are lessors of the plt., the demise must be stated as coming severally from each; or, to avoid this necessary allegation, they may demise to a third person, and the demise in the declaration may be made to the plt. through that person, *Adams, Eject.* 184; and, though tenants in common must demise severally, yet the demise may be laid as of the whole premises, under which an undivided moiety may be recovered: *Doe d. Bryant v. Wipper*, 1 *Esp. Rep.* 330. If the right of entry be in husband and wife, in right of the wife, the demise may be laid either by husband and wife, or by the husband alone: *Jordan v. Wilkes*, *Cro. J.* 332; *Tracey v. Dutton*, *ib.* 617. It is not now necessary, as formerly was the practice when a corporation demised, to allege it to have been made under a power of attorney, and by deed, *Furley d. Mayor of Canterbury v. Wood*, 1 *Esp. Rep.* 198, *Partridge v. Ball*, 1 *Ld. Raym.* 136, *Doe d. Dean and Chapter of Rochester v. Pearce*, *Adams, Eject.* 190; and so, in the case of tithes, the demise need not be stated to have been made by deed: *Partridge v. Ball*, 1 *Ld. Raym.* 136; *Carth.* 390, *s. c.* It is advisable, where any difficulty arises as to the party in whom the legal interest exists, to allege several distinct demises by persons severally interested, as in the case of trustees and *cestui que trust*, *Chit. Pl.* 879, *n. c.*, *Adams, Eject.* 184. It is necessary to obtain the consent of the person under whom a demise is claimed, to be permitted to make use of his name: *Doe d. Vine v. Figgins*, 3 *Taunt.* 440; *Doe d. Hammek v. Fillis*, 2 *Chit. Rep.* 170.

The name of the lessor of the plt. must be correctly stated, or a variance will be fatal, *Cro. Eliz.* 776. If the demise be by a corporation aggregate, the Christian names of the parties need not be inserted; but it is otherwise if the corporation be sole: *Carter v. Cromwell*, *Sav.* 128; *cited Dyer*, 86. Where the demise is by an infant, it is usual, with regard to the costs, to make his father or guardian the plt., instead of a fictitious person: *Noke v. Windham*, *Str.* 694; *Anon.* 1 *Wils.* 130, *Cowp.* 182.

*Statement of Time of Demise.*] The demise must be laid [\*449] subsequently \*to the plaintiff's right of entry, *Goodtitle v. Galoway*, 4 T. R. 680, B. N. P. 105; and it must not be laid after the service of the declaration, "because it would then appear upon the proof that the nominal plt. had no title at the time of the service," p. *Bailey, J.: Doe d. Laurence v. Shawcross*, 3 B. & C. 754; 5 D. & R. 711; *Doe v. Fachan*, 15 East, 286. It should be laid as far back as the title of the lessor will admit, with a view to the mesne profits, as the plt. is entitled to all such as may arise subsequently to the day of the demise: *Aislin v. Parkin, Burr*. 665. A demise by an administrator may be laid before administration granted, but it must be after the death of the party, 2 Selw. N. P. 682; and a demise by the heir by descent, on the day of the death of his ancestor, was held good, because, though made on the same day, yet it might be after the death: *Roe d. Wrangham v. Hersey*, 3 Wils. 274. When assignees of a bankrupt are lessors of the plt., the demise must be laid after execution of bargain and sale by the commissioners to the assignees, for the freehold remains in the bankrupt, though not beneficially, until taken out of him by the conveyance: *Doe d. Esdaile v. Mitchell*, 1 M. & S. 446; *Doe d. Whately v. Telling*, 2 East, 256. When an actual entry is necessary to avoid a fine, the demise must be laid after the entry: *Berington d. Dormer v. Parkhurst*, 13 East, 489; Str. 1086, s. c. Where the surrenderee of a copyhold is lessor of the plt., the demise may be stated to have been made between the times of surrender and admittance, *Holdfast d. Woollams v. Clapham*, 1 T. R. 600, *Doe d. Bennington v. Hall*, 16 East, 211, where *Ld. Ellenb.* observes, "We will not look to his title till admittance; but, when admitted, and his legal title perfected, we will look to his real title, derived from the act of the party surrendering to him, which has been made perfect by the subsequent admittance." In the case of a tenancy at will, the demise must be laid after the possession has been demanded, *Adams, Eject.*, 98. the possession of the deft. then becoming unlawful: *Right d. Lewis v. Beard*, 13 East, 210; *Hegan v. Johnson*, 2 Taunt. 148. In the case of a demise by overseers of the poor, it should be stated to be made by those for the time being, at the period of bringing the action, if the party has recognized a tenancy under them; or, if not, it may be laid as the demise of the overseers who granted him possession, *Doe d. Grundy v. Clarke*, 14 East, 488; perhaps any recognition, under any set of overseers, would be sufficient to support a demise laid from them: *ib.* 489. As regards the time of the demise, it is sometimes usual, should any difficulty occur as to the exact period, to insert different demises by the lessor of the plt. to have taken place on different days: *Adams, Eject.*, 185; 2 Chit. Pl. 880. The duration of the term, as alleged to have been demised to the plt., is not material; so the plaintiff may declare on a demise for five years, though the lessor of the plt. have only a lease for three years: *Doe d. Shore v. Porter*, 3 T. R. 19; B. N. P. 106; *Clerk v. Rowell*, 1 Mod. 10, overruling *Roe v. Williamson*, 2 Lev. 140. Where an actual entry is necessary, the demise should be laid subsequently to it: *Doe d. Lee Compere v. Hicks*, 7 T. R. 433.

*Statement of Premises.*] The description of premises in the declaration must be sufficiently certain; and it will be enough to state lands by the provincial names usually adopted in the counties where they are situate; thus, in *Norfolk*, "five acres of alder carr" has been held good; so, in *Suffolk*, for a beast gate, and, in *Yorkshire*, for a cattlegate; so, in *Durham*, for coal mines, without showing the number, *Wittingham v. Andrews*, *Salk.* 254, *Barnes v. Peterson*, *Str.* 1063, *Bennington v. Goodtitle*, *ib.* 1084; and, in *Ireland*, for a township, or kneave, for so many acres of bog, or of mountain, *ib.*, *Cottingham v. King*, *Burr.* 623; but for mountain or waste in England the description must be more certain, because those terms comprehend many sorts of land: *Hancock v. Price*, *Hard.* 57. Describing premises as a hop-yard, so also as an "orchard, has been held sufficient: *Wright v. Wheatley*, [\*450] *Noy*, 37; *Cro. E.* 854, s. c.; *Royston v. Eccleston*, *Cro. J.* 654. The word tenement is not a sufficient description of the premises, *Goodtitle v. Walton*, *Str.* 834, *Copleston v. Piper*, *Ld. Raym.* 191; nor is a messuage or tenement, *Goodright d. Welch v. Flood*, 3 *Wils.* 23, *Wood v. Payne*, *Cro. E.* 186; nor messuage and tenement, *Doe d. Bradshaw v. Plowman*, 1 *East*, 441; *Doe d. Stewart v. Denton*, 1 *T. R.* 11; but this error in describing the premises cannot, it appears, be now taken advantage of by the deft.: *Goodtitle d. Wright v. Otway*, 8 *East*, 357. A description, however, of the premises as a messuage or tenement, will be sufficient, if there be additional words tending to explain the uncertainty of the expression, as a messuage or tenement, called the *Black Swan*, *Burbary v. Yoemans*, 1 *Sid.* 295; describing the place as a passage-room has been held good: *Bindover v. Sindercombe*, 2 *Ld. Raym.* 1470. So "a certain place called the vestry," *Hutchinson v. Puller*, 3 *Lev.* 95, and "a room or chamber in a second story;" *Anon.* 3 *Leon.* 210. So, for a stable and cottage: *Hill v. Giles*, *Cro. E.* 218; *Lady Dacre's cases*, 1 *Lev.* 58; *Hamond v. Ireland*, *Sty.* 215. So, for a messuage or burgage, because they both have the same signification: *Danvers v. Wellington*, *Hard.* 173; *Rochester v. Rickhouse*, *Pop.* 203. So, describing the premises as "part of a house in A.:" *Sullivan v. Seagrave*, *Str.* 695; *Rawson v. Maynard*, *Cro. E.* 286. So, ejectment for "four corn mills;" *Fitzgerald v. Marshall*, 1 *Mod.* 90. In describing land, the particular species should be alleged, as pasture or meadow, &c., and the quantity of each must be shown, *Massey v. Rice*, *Cowp.* 346; *Savell's case*, 11 *Co.* 55; the term close is not a sufficient description, *Knight v. Sims*, *Salk.* 254; *Jones v. Hoel*, *Cro. E.* 235; ten acres of underwood has been deemed sufficiently certain, *Warren v. Wakeley*, 2 *Roll. Rep.* 482; so, fifty acres of gorse and furse: *Fitzgerald v. Marshall*, 1 *Mod.* 90; and fifty acres of furse, and heath and moor and marsh, *Connor v. West*, *Burr.* 2672, and ten acres of peas: *Odingsall v. Jackson*, 1 *Brown*, 149. So, for a manor, or a portion of a manor, as a moiety, without a more particular description: *Adams, Eject.*, 28. In ejectment for tithes, the quantity need not be stated; they will be sufficiently described as certain tithes of hay, wool, wheat, &c.: *Harpur's case*, 11 *Co.* 25; *Worrall v. Harper*, 1 *Roll. Rep.* 65; *Anon. Dyer*, 116. When there has been a former ejectment, and the person ejecting builds upon the premises, the owner need not mention the



building; a description of the land will be sufficient: *Goodtitle d. Chester v. Alker*, 1 Burr. 133. It is usual to allege the number of acres or messuages, &c. in the declaration to be greater in number than may actually be the case, for the plaintiff will be entitled to recover less than the number alleged, but he cannot recover more than that number, *Den d. Burgis v. Purvis*, Burr. 326, *Gay v. Rand*, Cro. E. 13; and a moiety, or third part, may be recovered, where in the declaration the whole is claimed: *Ablett v. Skinner*, 1 Sid. 229; *Goodwin v. Blackman*, 3 Lev. 334.

*Statement of Local Situation of Premises.*] There is no occasion to mention the parish or hamlet in which the premises are situate; the name of the place will be sufficient, *Goodtitle d. Bunbridge v. Walter*, 4 Taunt. 671; and, indeed, the name of the place need not be strictly alleged, if, from other parts of the declaration, a sufficient description can be collected: *Goodright d. Smallwood v. Strother*, Bl. R. 706. Where, however, the parish, &c. be attempted to be set out, it must be correctly alleged, or a variance will be fatal; as, where the premises were described as situate in the united parishes of *St. Giles in the Fields and St. George, Bloomsbury*, when it appeared that the two parishes were united by act of Parliament for the maintenance of their poor only, and not for any other purpose, it was held bad: *Goodtitle v. Sammimam*, 2 Camp. 274; 6 Esp. Rep. 128, s. c. So, describing [\*451] lands as situate in the parishes of A. \*and B., or one of them, was held bad for uncertainty: *Goodright v. Fawson*, 7 Mod. 457; *Cottingham v. King*, Burr. 624; *Goodwin v. Blackman*, 3 Lev. 334. But, where they were stated to lie in the parish of *Westputworth and Bradbury*, and it appeared they were separate parishes, it was nevertheless held good, for the word *parish* might be rejected: *ib.*; *Goodtitle v. Walter*, 4 Taunt. 671. So, where they were described as being in the parish of *Fardham*, and it appeared to be *Farnham Royal*, *Doe d. Tollet v. Salter*, 13 East, 9; or in *St. Mary, Lambeth*, and they were situate in *Lambeth*; *R. v. Glossop*, 4 B. & A. 619; *Kirkland v. Pounsett*, 1 Taunt. 570. Where the situation of the premises was stated to be in *Westbury*, and it appeared there were two *Westburys*, one on *Trym*, the other on *Severn*, it was still held to be good: *Doe d. James v. Harris*, 5 M. & S. 326; but see 13 East, 9. Where the premises are situate in two parishes, they may be described as lying in the two, or in each respectively: see *post*, “*Precedent*.”

*Plaintiff's Entry.*] This need not be alleged to have been made on any particular day, although it is usual to state one: *Adams*, 194; 2 Roll. R. 466.

*Statement of Ouster.*] An ouster should be stated; as to proof of it, see *post*. The day on which the ouster is stated to have taken place should be after the commencement of the supposed demise. It is not unusual, though unnecessary, to mention a particular day: *Cro. Jac.* 311. A mistake in the statement of the day, especially if the words “afterwards, to wit,” are introduced before it, would not, it seems, be immaterial: *Cro. Jac.* 96; *Adams*, 195; *B. N. P.* 106.

*NOTICE TO APPEAR. Form of.*] The notice to appear at the foot of the declaration should be directed to the tenant in possession by his

name, 7 *T. R.* 477, 1 *Chit. Rep.* 215, a. 1 *Moo.* 113, 2 *Chit. Rep.* 179. It is best to insert both his Christian and surname: 1 *Chit. Rep.* 573, a. When there are several tenants in possession, it is usual and best to prefix the name of all the tenants to each declaration, though this is not absolutely necessary: 7 *T. R.* 477; 5 *Moo.* 73. The notice must require the tenant to appear, and apply to the court to be admitted deft., instead of the casual ejector, within a certain time after the declaration is delivered; and the time when the notice should require the tenant to appear and make his application is regulated by the locality of the premises: *Adams*, 202. In a country ejectment, the notice should require the tenant to appear generally in the ensuing term, whether it be an issuable one or not: *Tidd*, 524; *R. G. E. T.* 2 G. 4, 4 *Taunt.* 738. In London or Middlesex, he should be required to appear on the first day of the term (not the essoign-day), or within the first four days of the term, and this should be strictly attended to: *Str.* 1049; *Barnes*, 175. It will, however, suffice, if the notice be to appear *generally* of the term, though indeed the tenant will then have the whole term to appear in: *Adams*, 203. The term should regularly be mentioned by a name, but if the notice and declaration otherwise, show what term is meant, it will be immaterial: *Adams*, 203. The notice should be regularly subscribed with the name of the casual ejector, but it will suffice if it be subscribed with the plt.'s name: *Barn.* 173; 3 *T. R.* 351.

PLEA.] The general issue is, not guilty; it is not now customary to plead any other plea, 1 *Chit. Pl.* 442, though accord and satisfaction was once permitted to be pleaded to this action, *Peytoe's case*, 9 *Co.* 77; and a plea to the jurisdiction has been allowed by permission of the court: *Williams d. Johnson v. Keen*, *B. H. R.* 197; *Doe d. Morton v. Roe*, 10 *East*, 523; *Deun d. Wroot v. Fenn*, 8 *T. R.* 474. The plea of ancient \*demesne has also been allowed in this ac- [\*452] tion, though not in general found: *ib.*; *Doe d. Rust v. Roe*, *Burr.* 1046; *Brittle v. Dale*, *Salk.* 158; 1 *Ld. Raym.* 43, s. c.

### Precedents.

#### DECLARATION BY ORIGINAL ON A SINGLE DEMISE.

In the K. B. (or C. P.)

— Term, 9 Geo. 4.

(Venue) (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, &c., entered into (describe the premises sufficiently to cover those sought to be recovered; the description may be as follows:) 10 messuages, 10 dwelling-houses, 10 carcasses of buildings, 10 stables, 10 out-houses, 10 gardens, 10 yards, 10 orchards, 100 acres of arable land, 100 acres of meadow land, 100 acres of pasture land, 100 acres of land covered with water, and 100 acres of other land (see description of other premises and property sought to be recovered; viz. a manor, rectory and tilhe, common of pasture, tithes, &c., 2 *Chit. Pl.* 877-8, 886), with the appurtenances, situate in the parish of C. (ante, 450), in the county of D., which A. B. had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the king, &c. And thereupon, the said John Doe, by —, his attorney, complains, that whereas A. B., on the — day of —, A. D. — (ante), at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from thenceforth, for and during, and unto the full end and tiffin of seven (insert enough to cover time, when plt. will get final judgment) years, from thence next ensuing, and fully to be complete and

ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed of the said term so to him thereof granted, as aforesaid; and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which the said A. B. had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the now king. Wherefore the said John Doe saith, that he is injured, and hath sustained damage to the value of £50; and therefore he brings his suit, &c.

## NOTICE TO APPEAR THERETO.

Mr. C. D. (*ante*, 451.)

I am informed that you are in possession, or claim title to, the premises in this declaration of ejectment mentioned, or some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next ——— term (*if, in the country, or if in London or Middlesex, "on the first day of next ——— term"*), in his majesty's Court of King's Bench, wheresoever his said majesty shall then be in England (*or, in the Common Pleas, "in his majesty's Court of Common Bench at Westminster"*), by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made deft. in my stead; otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this ——— day of ———, A. D. 1828.

Yours, &c.

Richard Roe.

[\*453]

## DECLARATION BY ORIGINAL IN A DOUBLE DEMISE, WITH ONE OUSTER.

In the K. B. (or C. P.).

—— Term, 9 Geo. 4.

(*Venue*) (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, &c., entered into 10 messuages, &c. (*enumerate the premises sought to be recovered, which may be as supra*), with the appurtenances, situate in the parish of C. (*ante*, 450), in the county of D., which A. B. had demised to the said John Doe for a term which is not yet expired; and, also, wherefore the said Richard Roe, with force and arms, &c., entered into 10 other messuages, &c. (*enumerate the premises as before, adding the word "other" before each of such premises*), with the appurtenances, situate in the parish aforesaid, in the county aforesaid, which E. F. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said several farms, and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the king. And thereupon the said John Doe, by ———, his attorney, complains, that whereas the said A. B., on the ——— day of ———, A. D. ———, at the parish aforesaid, in the county aforesaid, had demised the said tenements first above-mentioned, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from thenceforth for and during, and unto the full end and term of seven (*insert enough to cover the time till pl. can get final judgment*) years from thence next ensuing, and fully to be complete and ended;\* and also that whereas the said E. F., on the ——— day of ———, A. D. ———, at the parish aforesaid, in the county aforesaid, had demised the said tenements secondly above-mentioned, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from thenceforth, for, and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended. By virtue of which said several demises, the said John Doe entered into the said several tenements above-mentioned, with the appurtenances, and became and was thereof possessed for the said several terms so to him thereof respectively granted, as aforesaid; and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the ——— day of ———, A. D. ———, with force and arms, &c., entered into the said several tenements first above-mentioned, with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms, and other wrongs, &c. (*Conclude as in the preceding precedent, and add the like notice to appear.*)

## THE LIKE, WITH TWO OUSTERS.

(*Commencement as in the last precedent to \*.*) By virtue of which said demise the said John Doe entered into the said tenements first above-mentioned, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on,

&c., with force and arms, &c., entered into the said tenements first above-mentioned, with the appurtenances, which the said A. B. had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, and ejected him, the said John Doe, from his said farm; and, also, that whereas the said E. F., on, &c., at, &c., had demised the said tenements secondly above-mentioned, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from thenceforth, for, and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended. By virtue of which said last-mentioned demise, the said John Doe entered into the said tenements secondly above-mentioned, with the appurtenances, and became and was thereof possessed for the said last-mentioned term so to him thereof granted, as aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on, &c., with force and arms, &c., entered into the said tenements secondly above-mentioned, with the appurtenances, which the said E. F. had demised to the said John Doe in manner and for the term last-aforesaid, which is not yet expired, and ejected the said John Doe from his said last-mentioned farm, and other wrongs, &c. (*Conclude as in first precedent, and add the like notice to appear.*)

## DECLARATION IN EJECTMENT BY BILL IN K. B.

Ellenborough.

— Term, 9 Geo. 4.

(*Venue*) (to wit.) John Doe complains of Richard Roe, being in the "custody of the marshal of the Marshalsea of our lord the now king, before the king him-  
self, for that whereas A. B., on the — day of — in the — year of the reign [454]  
of our said lord the king, at the parish of —, in the county of —, had demised to the said John Doe 10 messuages, &c. (*describe the premises, see ante*), with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, to have and to hold the same to the said John Doe and his assigns, from thenceforth, for, and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted, as aforesaid; and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the king, and to the damage of the said John Doe of £50; and therefore he brings his suit, &c.

Pledges to prosecute, { John Denn,  
and  
Richard Fenn.

## NOTICE TO APPEAR THERETO.

Mr. C. D.

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear on (*as ante*, 452) in his majesty's Court of King's Bench, at Westminster, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made deft. in my stead; otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this — day of —, A. D. 1828.

Your's, &amp;c.

Richard Roe.

## DECLARATION BY TENANTS IN COMMON.

The demise by tenants in common of an undivided share is the same as in other cases, except stating it to be "one undivided moiety or half part the whole into two equal moieties, to be divided of and in," and adding a count on the demise of the other tenant in common with the same words.

## PLEA OF GENERAL ISSUE.

— Term, 9 Geo. 4.

C. D. } And the said C. D., by L. M., his attorney, comes and defends  
ats. } the force and injury, when, &c., and says that he is not guilty  
Doe, on the demise of A. B. } of the supposed trespass and ejectment (*or, if several ousters are laid in the declaration, "of the supposed trespasses and ejectments"*) above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; and of this he, the said C. D., puts himself upon the country, &c.

*Evidence for Plaintiff.*

**IN GENERAL. Plaintiff's Title.]** Strict proof of title will be unnecessary, where a privity exists between the parties, as in the case of the common relationship of landlord and tenant, where the tenant is precluded from disputing his landlord's title: *Driver v. Lawrence*, 2 W. Bl. R. 1259, *post*, 464. In other cases, where no such privity exists, strict proof of title will be necessary. In cases where there is a privity between the parties, it will, in general, be sufficient to prove [\*455] that the deft., or those \*under whom he claims, were admitted into possession of the premises by the lessor of the plt., and that their right to the possession has ceased: *Adams*, 247. It has been considered, that a party may be estopped from disputing the title of another in this action, by referring the question of the right to the land to an arbitrator, who has awarded in favour of the lessor of the plt.: *Doe v. Rosser*, 3 East, 11; *sed vide* 15 East, 100.

The plt. must, in all cases, prove that he has a legal title to the premises, at the time of the demise laid in the declaration; evidence of an equitable estate will not be sufficient: *Goodtitle v. Jones*, 7 T. R. 49; *Doe v. Wrooths*, 5 East, 132; *Roe v. Read*, 8 T. R. 118. As to when trustees take the legal estate, see 2 Saund. 11; 2 Bla. Com. note, *Chitty's ed.* Plt. cannot rely upon the inadequacy of the deft.'s title, but must recover upon the strength of his own: *Martin d. Tregonwell v. Strachan*, 5 T. R. 110, n.; *Graham v. Peat*, 1 East, 246; *Goodtitle d. Parker v. Baldwin*, 11 ib. 488. Proof of an undisturbed adverse possession for twenty years, is sufficient presumptive evidence of title to recover in ejectment: *B. N. P.* 103; *Barwick v. Thompson*, 7 T. R. 488; *Dean v. Bernard*, 1 Coup. 597; *Stokes v. Berry*, Salk. 421; 1 Ld. Raym. 741, s. c.; *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Taylor v. Horde*, 1 Burr. 119; 2 Saund. 175, n. As to what constitutes such adverse possession, see *post*.

**Right of Entry.]** The plaintiff must also prove that his legal estate was accompanied by a right of entry on the premises at the time of the demise laid in the declaration. Proof of his being entitled to this right of entry at the time of the demise laid will be sufficient, although such right be divested before trial: 11 East, 488. Whatever takes away this right of entry, takes away also the remedy by ejectment, although the legal estate still remains in the claimant: *Adams*, 34. A right of entry may be destroyed or taken away by the Statute of Limitations, by descent, or by discontinuance, as to which, see *post*. If the plt. comes within any of the exceptions in the statute, or has any answer to a defence of this nature, he should be prepared with proofs accordingly: *post*.

**Actual Entry, when necessary.]** An actual entry must be proved, to avoid a fine levied with proclamations, *Oates v. Brydon*, 3 Burr. 1897; *Doe v. Watts*, 9 East, 19, *Barrington v. Parkhurst*, 2 Str. 1086, 13 East, 489, s. c.; but not so where the fine is levied without proclamations, *Jenkins v. Pritchard*, 2 Wils. 45; or if the proclamations be made after the commencement of the action, *Doe v. Watts*, 9 East, 19; and, in general, if the action be commenced within twenty

years, no entry seems necessary, though, if the twenty years be near expiring, it is said to be a prudent measure to make an entry; "for, in the case of an actual entry *before* the expiration of twenty years, it seems that an ejectment may be brought *after*; or, if the plt. should fail in the ejectment, whether brought *within* twenty years or *after*, he may bring another, provided the ejectment in these cases is commenced within a year after such actual entry made; according to 4 *Anne*, c. 16, s. 16:" 1 *Saund.* 319, f.; *Doe d. Lee Compere v. Hicks*, 7 *T. R.* 433. No entry is necessary, where the fine has been levied by a mere tenant for years, 18 *Vin.* 413, *Peaceable v. Read*, 1 *East*, 575; nor where the son of a tenant by sufferance holds over, *Doe v. Perkins*, 3 *M. & S.* 271; nor is it necessary, where the action is brought on a clause of re-entry for non-payment of rent, *Goodright v. Cator*, *Dougl.* 477; the entry need not be made by the party claiming; if it be done by some person under his authority, it will be sufficient, *Co. Lit.* 258, *Podger's case*, 9 *Co.* 106, even though the entry be made without consent of the claimant; yet a subsequent ratification will make it good, *ib.*; indeed, the bringing the action of ejectment will be evidence of assent: *B. N. P.* 103. Such assent must, however, be within five years after entry made: *Co. Lit.* 245; *Fitchet v. Adams*, *Str.* 1128. The entry \*must be made upon the land claimed, and it will not be [\*456] sufficient to make the claim at the gate of the house, unless such gate be upon part of the land, *B. N. P.* 103, *Focus v. Salisbury*, *Hurd*, 400, *Anon. Skin.* 412; but, if an actual entry is prevented, the claim may then be made as near the land as it conveniently may: *Co. Lit.* 253. An entry generally, or on part of the lands, is an entry upon the whole, unless it be defined otherwise, 1 *Saund.* 319, *Doe d. Tarrant v. Hellier*, 3 *T. R.* 170; though, if the lands are situate in different counties, there must be an entry for each county, *Lit. S.* 417, *Adams, Eject.* 92; and it must be made with the intention of claiming the land; so, it was held an insufficient entry, where the lessor's intention was to make the demise, and not for the purpose of avoiding the fine: *Ber-rington d. Dormer v. Parkhurst*, *Str.* 1086; 13 *East*, 489, s. c. Where tenant for life levies a fine, though it is no bar to those in remainder, yet it seems that a remainder-man must make an actual entry before he can maintain an ejectment: *Doe d. Compere v. Hicks*, 7 *T. R.* 433. If one of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it: *Roe d. Touscott v. Elliot*, 1 *B. & A.* 85.

In the case of a vacant possession (that is, where the premises are wholly deserted by the tenant, and he cannot be found, in order to be served with a declaration in ejectment), an actual entry must first be made upon some part of the premises: see the mode of so doing, with the other requisites, 2 *Archb. P.* 59.

*Identity of Premises, and Deft.'s Possession of them.*] Since the rules of *M. T.*, 1 *G.* 4, *K. B.* and *H. T.*, 1 and 2 *G.* 4, *C. B.*, this is no longer necessary. *Quære*, if it be now necessary, since those rules, to prove the local situation of the premises, as described in the declaration. Where the deft. has obtained particulars of the premises sought to be recovered, plt. cannot travel out of them.

*Actual Ouster.*] The common consent-rule will now, in general, be sufficient evidence of the deft.'s ouster, or forcible dispossession: 3 *Burr.* 1895; 1 *Camp.* 173. In an action, however, by one joint-tenant parcener, or tenant in common, against his companion, where the latter has entered into a special consent-rule, not absolutely confessing an ouster, such ouster should be proved. Where one tenant in common held possession, absolutely and solely, for thirty-six years, without any account to, demand made, or claim set up by his companion, it was held sufficient evidence of an ouster, *Doe d. Fisher v. Prosser, Cowp.* 217; but the bare perception of the profits by one tenant in common, is not sufficient to afford presumption of an ouster: *Fairclaim d. Fowler v. Shackleton, 5 Burr.* 2604. Where there were two joint-tenants, and one went out at the request of the other, it was held to be an ouster, *Vin. Ab. v.* 14, 512; and so a demand of possession by one tenant in common, and a refusal by the other, stating that he claimed the whole, is evidence of an ouster of his companion: *Doe d. Hellings v. Bird, 11 East,* 49; *Cowp.* 217. One tenant in common levying a fine of the whole, and taking the rents and profits afterwards, without accounting for nearly five years, is no evidence of an ouster of his companion at the time of the fine levied: *Peaceable d. Hornblower v. Read, 1 East,* 568, 574. Adverse holding over the possession of the premises, contrary to the terms of the tenancy, is full presumptive evidence of an actual ouster: *Taylor v. Fisher, Loft,* 766.

*Damages.*] In ordinary cases, the damages are merely nominal; the damages actually sustained by the detention of the property, &c., being usually recovered in an action of trespass for mesne profits: *post*, "*Mesne Profits.*" But, in ejectment by landlord against tenant, where [\*457] ther the deft. \*appear at the trial or not, the plt., after proof of his right to recover possession of the whole, or any part of the premises, may proceed to give evidence of the mesne profits thereof, which shall have accrued from the day of the determination of the tenant's interest down to the time of the verdict, or to some preceding day, to be specially mentioned therein; and the jury shall thereupon give their verdict, both as to the recovery of the premises, and as to the amount of the damages to be paid as mesne profits: 1 *G.* 4, c. 87, s. 2; 2 *Archb.* 55. If the plt. wish to recover the mesne profits from the time of the verdict down to the time when possession is delivered to him, he may afterwards proceed for it by action of trespass for mesne profits, *ib.*: as to the evidence of damages, *post*, "*Mesne Profits.*"

#### BY HEIR.

*By Heir of Freehold.*] When an heir at law maintains this action, he must prove that the ancestor, or person from whom his title springs, was the person last seised of the premises, *Jenkins d. Harris v. Prichard, 2 Wils.* 47; and that he is the heir, either lineally or collaterally descended: 2 *Bl. Com.* 208; *Higham v. Ridgway, 10 East,* 120. If he be heir to remainder-man, he must show that his ancestor was the person in whom the remainder was first vested by purchase: 3 *Rep.* 42, a.

The *seisin.* of the ancestor may be shown by the fact of his having

been in possession; for possession alone is *prima-facie* evidence of a seisin in fee: *B. N. P.* 103. The seisin may also be proved by showing the ancestor was in the receipt of the rent from the tertenant: *ib.*; *Jayne v. Price*, 4 *Taunt.* 326; and see 3 *B. & C.* 298. The possession of a guardian in socage confers an actual seisin in the infant: 3 *Wils.* 516. Where A. dies seised, having two infant daughters by different venters, an entry by the mother of the youngest daughter, as her guardian in socage, constitutes a sufficient seisin in the eldest daughter to carry the descent of her moiety, on her death, to her heirs: *Doe d. Bennett v. Keen*, 7 *T. R.* 386. If a father die, his estate being out at a freehold lease, that is not such a possession as to induce the *possessio fratris*, unless the elder son live to receive rent after the expiration of such lease, but it has always been the settled rule, that if the father die, leaving his estate out on a lease for years only, the possession of the tenant is so far the possession of the elder son as to constitute the *possessio fratris*: *p. Ld. Kenyon, C. J.*; *ib.* The seisin may be proved by the declaration of a deceased tenant, that he held under the ancestor: *Uncle v. Watson*, 4 *Taunt.* 16. If it be probable deft. can rebut plt.'s *prima-facie* case of seisin, strict proof of the ancestor's title had better be adduced.

To show the *heirship* of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised, from some common ancestor, or at least, from two brothers or sisters, *Roe d. Thorne v. Lord*, 2 *W. Bl. R.* 1099; if he claims collaterally, together with the extinction of all those lines of descent which would claim before him, this is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties: *Adams*, 250. The plt. must prove that all the intermediate heirs between himself and the ancestor, from whom he claims, are dead, without issue: *Richards v. Richards*, 15 *East*, 294, *n.* It is a maxim, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living: *Wilson v. Hodges*, 2 *East*, 312; *ante*, "Death." The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of proving facts of this nature, *post*, "*Parish Register*," "*Hearsay Evidence*," "*Public Documents*;" and, when the claimant is the lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But, when he claims "as collateral heir, and it is necessary to trace the relation- [\*458] ship between him and the person last seised, through many descents, to a common ancestor, difficulties often intervene from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature, and allow hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact handed down from one to another) to be admitted as evidence, in cases of pedigree: *Higham v. Ridgway*, 10 *East*, 120; *Adams*, 251; *post*, "*Pedigree*," "*Hearsay Evidence*." But hearsay evidence of a



relation cannot be admitted, when he himself can be called, *Rendrell v. Rendrell*, Str. 294, 3 Camp. 457, nor can the opinions of deceased neighbours, or acquaintances of the family, be admitted: 13 Ves. 147, 514; 3 T. R., 707, 723; 1 M. & S. 688. Hearsay evidence is also inadmissible to prove the *place* of any particular birth: 8 East, 542. The declarations of the deceased relative should also, to render them admissible evidence, be made under circumstances when the relation may be supposed without any interest, and without a bias; therefore, declarations made after a suit commenced, or a controversy preparatory to one, are not admissible: 4 Camp. 401.

Stronger and further proofs should be adduced, according to the expected defence: see *post*, "*Evidence for Defence*."

When the lessor claims as heir, and proves his pedigree, and stops, and the deft. sets up a new case, which is answered by fresh evidence on the part of the lessor, the deft. is entitled to the general reply, 4 T. R. 497; and if, after the pleadings are opened by the junior counsel for the lessor, the deft.'s counsel expresses himself ready to admit the lessor to be heir, it will entitle him to open the case, and make the first address to the jury: *Adams*, 255.

*By Heir of Copyhold, &c.*] If the lessor of the plt. be heir by the custom of the place, in addition to the foregoing, he must show the custom, 4 Leon. 242, 1 Roll. 624, and that he comes strictly within it: *ib.* If the lessor claims as heir to a copyhold, the rolls of the manor must be produced, which show a surrender to him, or to those under whom he claims, 16 East, 208, 3 T. R. 162, *post*, 461. It is not necessary he should prove his own admittance, unless the action be against the lord: 1 Leon. 100; 1 East, 600; 3 T. R. 162. If the ejectment be against the lord, he must either show that he is admitted, or that he has been refused admittance. It is not necessary for him, in such case, to have tendered himself to have been admitted at the lord's court, if the steward, upon application out of court, has refused to admit him: 2 M. & S. 167; *Adams*, 254. The custom may be proved by the different admissions of the customary heirs upon the court-rolls of the manor, produced by the steward upon oath, or by the medium of verified examined copies; but, if the ancient rolls be lost, or there be no instance of any admission in them similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence as to the existence of the custom: *Adams*, 254, 5; 5 T. R. 26; 1 T. R. 466; see 3 Wils. 13.

#### BY DEVISEES.

*By Devisee of Freehold.*] To enable the devisee of a *freehold estate* to support this action, the will under which he takes must be proved, with all its requisites as to attestation, &c., pursuant to 20 Car. 2, c. 3, s. 5, B. N. P. 246, viz. the signature by testator, the publication by him before three or more credible witnesses, the witnesses' subscription in his presence, and that they all signed: *post*, "*Will*." If, [\*459] indeed, the will be one of "thirty years' standing, after proving the proper custody from whence it came, it may be read in evi-

dence, without further proof: 9 *Ves. J. 5*; *Doe v. Brabant*, 4 *T. R.* 707; see *post*, "*Will*," "*Written Evidence*." The conditions precedent to the lessor's taking as devisee, if any, must be proved to have been fulfilled. The determination, also, of any estates limited by the will prior to the lessor's devisee, if any should be proved. He must also prove the seisin of his devisee, as to which, see *ante*, 457. The death of the testator should also be proved: *ante*, "*Death*." A devisee of a freehold may immediately, without any possession, maintain an ejectment for the lands devised: *Co. Lit.* 240, *b*. Further and stronger proofs should be adduced, according to the expected defence: see "*Evidence for Defence*," *post*.

*By Devisee of Copyhold.*] When the lessor of the plt. claims as devisee of a copyholder, he must prove that his deviser was admitted to the estate, and his surrenderor to the use of the will, and he must also show that he himself has been admitted, *Doe d. Vernon v. Vernon*, 7 *East*, 8, *Roe d. Jeffery v. Hicks*, 2 *Wils.* 13, *Roe v. Wroot*, 5 *East*, 137; for which purpose the entries on the manor rolls may be produced as evidence, *Folkard v. Hemet*, 2 *W. Bla.* 1061, *Rex v. Shelly*, 3 *T. R.* 141, *ante*, "*Copyhold*;" though, if he be devisee in remainder, it will be sufficient for him to prove the admittance of the tenant for life: *Auncelme v. Auncelme*, *Cro. J.* 31. The identity of the parties admitted must also be established: *Doe d. Hanson v. Smith*, 1 *Camp.* 197. The party must also produce his deviser's will, which, not falling within the Statute of Frauds, will be sufficient, though it be not signed or attested, *Walsh v. Edmunds*, *Cro. E.* 100, *Doe d. Cook v. Danvers*, 7 *East*, 299, *Wagstaff v. Wagstaff*, 2 *P. Wms.* 249; the will, however, must appear to be in writing, 32 *H.* 8, *c.* 1, though papers, bearing but a slight resemblance to wills, have been held sufficient to pass copyhold premises: *Carey v. Askew*, 2 *Bro. Cha. Rep.* 58; *Doe v. Smith*, *Pea. Evi.* 456; 1 *Ander.* 34. Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was held that the devisee, though afterwards admitted, could not recover in ejectment, for the admittance of the second devisee had no relation to the last legal surrender, and the legal estate remained in the heir of the last surrenderer: *Doe v. Vernon*, 7 *East*, 8.

*By Devisee of Leasehold.*] In ejectment by a legatee of a leasehold interest, the plt. must establish the title of the testator, showing that he had a chattel interest in the premises. Proving that he died in possession would not suffice, as that would, *prima facie*, be evidence of a seisin in fee: *Adams*, 266. The leasehold interest is usually proved by production and proof of the execution of the lease; or if testator was an assignee, the execution of the lease and the assignment to him. In a case where the lessor put in an answer of the defts. to a bill in equity, in which the deft. stated "he believed the lessor was possessed of the leasehold premises in the bill mentioned," it was held, as against the deft., sufficient evidence that the interest of the testator was only a chattel one: *Doe v. Steel*, 3 *Camp.* 115.

The plt. must also adduce evidence of the probate of the will, see *post*, "*Executor*," "*Probate*," and prove the executor's assent to the bequest: 1 *Inst.* 111, *a*. Such assent is absolutely necessary, *Toller*,

344; and it makes no difference though the legatee be also an executor. The assent may be express or implied, slight evidence of it is sufficient: 1 *Lev.* 25; *Com. D. Adam.* C. 67; 1 *Roll. Ab.* 920; 5 *Roll. R.* 158; *Toller*, 344, 5. As to disclaimer, see 3 *B. & A.* 31.

[\*460]

\*BY TRUSTEES.

When the ejectment is by a trustee, he must show he has the legal estate in the premises. In all cases in which the trusts are not executed by the Statute of Uses, the legal estate vests in the trustees; and see the law and cases as to when trustees have been held or not to take the legal estate, *Adams*, 74 to 79; 2 *Bl. Com. by Chitty*, 335, n. 60. The general rule is, that where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee, has only a trust estate: see 3 *B. & P.* 178; 2 *T. R.* 444; 6 *T. R.* 213; 8 *East*, 248; 12 *East*, 445; 4 *Taunt.* 772. As to outstanding terms, it should, in general, be proved they have been surrendered. Where it is the interest of the owner of the inheritance, that a satisfied term should be considered as surrendered, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed: *Doe v. Wright*, 2 *B. & A.* 720. Where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the *cestui que trust*, a jury may, under circumstances, presume such conveyance or surrender: *Lade v. Halford*, *B. N. P.* 110; *Goodtitle v. Jones*, 7 *T. R.* 45. As where an estate is directed to be conveyed, a jury may, within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustee: *Doe v. Slade*, 4 *T. R.* 682. In the case of a satisfied term, where acts were done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of the trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender: *Doe v. Hilder*, 5 *B. & A.* 791. On the other hand, where a term of years becomes attendant upon the inheritance, either by operation of law, or by special declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor; and there appears, therefore, to exist no circumstance from which a jury can imply a surrender: *ib.* And the mere fact of a term being satisfied, furnishes no ground from which the jury can presume it surrendered: *Evans v. Bicknell*, 6 *Ves.* 185. There ought to be some dealing with the term to authorize such a presumption: *ib.*; *Cholmondeley v. Clinton*, cited *Sugd. V. & P.* 426. Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission inconsistent with the existence of the term, there is

still less ground to presume a surrender from the mere lapse of time, and silence of the party who possesses the inheritance: see *Sugd. V. & P.* 389, 391; *Roscoe*, 259. The recognition of the term as subsisting at a late period, *Doe v. Scott*, 11 *East*, 478, the fact that it would have been contrary to the duty of the trustees to surrender the estate, *Keene v. Deardon*, 8 *East*, 267, or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there having been no conveyance, *Doe v. Read*, 5 *B. & A.* 237, are all circumstances from which a jury may infer that no conveyance has taken place: *Roscoe*, 260.

#### BY ADMINISTRATOR OR EXECUTOR.

In ejectment by an administrator, he must, in addition to the other general proofs, produce the letters of administration under the seal of the court, or the entry in the ecclesiastical record, or [\*461] an examined copy of it, will be sufficient, *Garrett v. Lister*, 1 *Leon.* 25, *Peaslie's case*, *ib.* 101, *Elden v. Kiddell*, 8 *East*, 187, *Ray v. Clerk*, 13 *East*, 238; or an exemplification of the letters of administration: 8 *East*, 187, *Kempton v. Cross*, *C. T. Hard.* 108. Where the lessor of the plt. is an executor, he must produce the probate of the will: *R. v. Stone*, 6 *T. R.* 295: *R. v. Horseley*, 8 *East*, 410. We have seen an executor may lay the demise before the probate, but after the death of his testator: *ante*, 449. It is immaterial whether the ouster be after or before the death of the testator, or intestate: 4 *Co.* 92, 95, *a.* In addition to these proofs, however, the title of the testator or intestate must be proved: *ante*, 454, 457.

The personal representative can recover only those premises which the testator or intestate held for a term of years: 4 *Co.* 92, 95, *a.*; 3 *T. R.* 13. They may recover under the 29 *Car.* 2, c. 3, s. 12, appropriating estates from *autre vie*, where there is no special occupation; but this act does not extend to copyholds: 7 *East*, 186.

#### BY ASSIGNEES OF BANKRUPT.

*In Ejectment by Assignees of Bankrupt.]* They must prove the title of the bankrupt to the premises for which they maintain the ejectment, 2 *Phil. Ev.* 306; and the assignment and bankruptcy must also be proved in the usual way: *ante*, "*Bankruptcy*." By the 6 *G.* 4, c. 16, the general assignment invests the assignees with all the power necessary to maintain the ejectment of all leaseholds (except for lives) belonging to the bankrupt, whether in his possession or not, at the time of the bankruptcy. With respect to freehold estates for lives, estates tail (except copyhold), they do not pass by such assignment, but must, by the 6 *G.* 4, c. 16, s. 64, be conveyed by the commissioners by deed indented and enrolled; and, until enrolment and bargain and sale are completed, the assignees cannot maintain an ejectment for such property: *ante*. This provision includes, not only estates in possession, but also estates in remainder or reversion: 3 *P. Wms.* 132; *Amb.* 394; 3 *Mer. App.* 667. It also includes incorporeal hereditaments: *Archb. B. L.* 125. The deed only affects premises to which the bankrupt is entitled at the time of its execution; if he acquire any future real estates, there

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must be a new bargain and sale to vest the legal estate in the assignees: 1 *Atk.* 252; *Esp. N. P.* 431. As to copyholds, see the 6 *G.* 4, c. 16, s. 68; the conveyance to the assignees is by bargain and sale.

### BY COPYHOLDER OR HIS ASSIGNEE.

In ejectment by the surrenderee of *copyhold* premises, he must prove the surrender to his use, and his subsequent admittance; for the legal title does not vest in the surrenderee until after admittance: 2 *Wils.* 13, 15; 1 *T. R.* 393. When the admittance has been made, the title relates back to the time of the surrenderer, against all persons but the lord; and, therefore a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the trial: 1 *East*, 600; 16 *East*, 208; *Adams*, 61. When the lessee of a copyholder is plt., he must, after proving the copyholder's title, show a special custom in the manor, allowing the copyholder to make leases for years, or that the lord has licensed the lease to be made before it was made: *Co. Copy*, s. 51. If a copyholder, without license, make a lease for one year, or, with license, make a lease for many years, and the lessee be ejected, he must not sue in the lord's court by plaint: *ib.*; *Cro. Eliz.* 535. As to proofs in actions by heir or devisee of copyholder, *ante*, 458, 9.

### [\*462] \*BY JOINT-TENANTS, TENANTS IN COMMON, &c.

Where the plt. declares on a joint demise under several lessors, evidence must be given of a joint interest in the premises; but, if the demise be several, evidence of either a joint or several interest will be sufficient: *Doe d. Marsack v. Read*, 12 *East*, 57. In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the deft., who had paid one entire rent to the clerk of the trustees, to show that the trustees were appointed at different times, as evidence of their being tenants in common; for, as against their tenant, his payment of the entire rent to the common agent of all, is, at all events, sufficient to support the joint demise, without making it necessary for them to show their title more precisely: *Doe d. Clarke v. Grant*, 12 *East*, 221. As to the evidence of the ouster in an action by one joint-tenant, or tenant in common, against another, see *ante*, 456.

### BY PARSON.

It is incumbent upon a *parson*, who brings an ejectment for the parsonage-house, glebe, or tithes, to prove that the property sought to be recovered is church property; as, that the premises were occupied by a former incumbent, or the like: 2 *Phil. Ev.* 258. The tithes and rectory are not the same; therefore an ejectment for a parsonage and glebe will not be supported by showing that the deft. entered and took the tithe belonging thereto: *Latch*, 61. The plt. must prove his lessor's admission, institution, and induction, *B. N. P.* 105, a., *Heath v. Pryn*, 1 *Vent.* 14, *Snow v. Phillips*, 1 *Sid.* 220; and he will not be required to show his patron's title, *ib.*; nor need he prove that he has subscribed

to the thirty-nine articles: *Powell v. Milbank*, 3 Wils. 355; 2 W. Bl. 851, s. c. As to proof of entries in the books of a rector, see *post*, "Writings," "Tithes." Where induction, however, has not followed institution, the presentation must be proved, *B. N. P.* 105; and a verbal presentation will be sufficient, *ib.*; *R. v. Griswell*, 3 T. R. 723. If the presentation be by a corporate body, it must be under seal: *ante*, "Corporation." As to proof of institution and induction, *post*, "Tithes." The institution may be proved by the letters testimonial of institution, or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation, *Gibson's Codex*. 794; and, in which case, it would be evidence of the presentation as well as induction: 2 *Phil. Ev.* 257. The letters of institution of a party reciting the cession of his predecessor, followed by induction, are evidence of the cession: *Doe v. Carter*, 1 R. & M. 238. The induction may be established by proof of the endorsement on the mandate, directed by the ordinary to the archdeacon, or by the return (if any) to the mandate, or by some person present at the ceremony: 2 *Phil. Ev.* 257.

When the ejectment is by a lay impropiator, he must adduce strict evidence of title, by showing that the rectory belonged originally to one of the dissolved monasteries, and was granted by the crown to one under whom he claims, *Com.* 651; but, as deeds and muniments are liable to be lost, length of possession and old deeds conveying tithes have been held sufficient evidence of the title: 5 T. R. 256, n.

#### BY GUARDIAN.

Where the *guardian* in socage maintains ejectment, he must prove title in the ward, and that he is under fourteen years of age, *Doe d. Rigge v. Bell*, 5 T. R. 471; and, if he be testamentary guardian, that the ward is under twenty-one years of age, *Adams*, 270. His own title as guardian must also be made to appear, 1 P. Wms. 260, *Bac. Ab. Guardian, A.*, 9 \**Mod.* 142, and the seisin of the ancestor [\*463] of the ward, 2 *Phil. Ev.* 251. A guardian for nurture cannot maintain ejectment: *Vaugh.* 177; 2 Wils. 129. As to an infant's and guardian's power to maintain an ejectment, see *Adams*, 64.

#### BY TENANT BY ELEGIT.

In ejectment by a *tenant by elegit*, he must prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon, by which the premises are assigned to him: *B. N. P.* 104, a.; *Ramsbottom v. Buckhurst*, 2 M. & S. 565. Should, however, the possession be not in the debtor, but in a third party, the title of the debtor must be proved to have determined: *Doe d. Da Costa v. Wharton*, 8 T. R. 2. There will be no occasion to prove a copy of the elegit and inquisition: 2 M. & S. 565. The return of the sheriff must be correct; so it was held *plt.* could not recover where it did not appear by the return that a moiety of the lands had been set out by metes and bounds, *Fenny d. Masters v. Durant*, 1 B. & A. 40; and the return will also be void, if it amount in value to more than a moiety of the whole, *Den d. Taylor v. Abington*, 2 Doug. 474; *Salk.* 563; *B. N. P.* 104.

### BY CONUSEE OF A STATUTE MERCHANT OR STAPLE.

The conusee of a statute merchant must prove the obligation of the conusor, or a certified copy of the roll in the office of the clerk of the recognizance: *B. N. P.* 104; 2 *Saund.* 69, *b.* He must also prove the *capias si laicus*, and the return thereto: *Hammond v. Wood*, 2 *Salk.* 563. The return on the statute merchant may be in the *K. B.* or *C. P.*: *F. N. B.* 304. The conusee of a statute staple must prove the bond of the conusor, or a certified copy; he must also prove the writ of *liberate*. The return on the statute staple must be in the Court of Chancery: *F. N. B.* 2 *Saund.* 70, *b.* If he proceed against third parties, he must prove the title of the conusor; and, if such third party's interest proceed from the conusor, the plt. must show that it has determined: *Doe v. Wharton*, 8 *T. R.* 2.

In the foregoing actions by particular parties, the evidence has been considered with reference to cases where no privity exists between the deft. and the lessor of the plt., or those under whom he claims. We will now consider the requisite evidence in actions by particular persons where such privity does exist: as, in actions by landlord against his tenant, by mortgagees, and by lords of manors. In general, in such cases, instead of proving title, the claimant should show the existence and termination of the privity; for a privity will not be presumed to exist without proof, but, being proved, the presumption is in favour of its continuance: *Adams*, 271. Thus, if the deft., or those under whom he defends, be let into possession pending a negotiation for a purchase or a lease, proof must be given of the circumstances under which he was let into possession, and also of the breaking-off of the negotiation, before the day of the demise laid in the declaration: *ib.* In like manner, if he has become tenant at will of the premises, the lessor must show how he became so, and that the will was determined by demand of possession, or otherwise, and so forth: *ib.*

### BY LANDLORD.

The claimant in this case must prove the tenancy between him and the deft., or those under whom he defends, and the determination of such party, either by effluxion of time, a notice to quit, or breach of a condition of such tenancy.

*\*Tenancy.*] As we have already seen, *ante*, 454, by proof [\*464] of this, the claimant is superseded the necessity of establishing strict evidence of title; it being a general rule that a tenant cannot dispute the title of his landlord: see *Doe v. Samuel*, 5 *Esp. Rep.* 174; 2 *Bing.* 574; *Moo.* 298. And, where the deft. came in under the claimant, he cannot, it seems, set up as a defence that his title has expired, 4 *T. R.* 682, 3 *M. & S.* 516, unless he solemnly renounced such title at the time, and attorned to the party having title, 2 *Camp.* 11; *Stark. on Ev. Ejectment*. The tenant cannot, also, in general, dispute the title of his landlord's assignee, if a due conveyance thereof from the landlord, and notice thereof to the tenant, be proved, and he remain in possession; for the estoppel

holds in favour of the assignee, if it would obtain in favour of the landlord: *Rennie v. Robinson*, 1 *Bing.* 147; 7 *Moo.* 539; *Doe v. Whitroe*, *D. & R. N. P. C.* 1; 5 *B. & C.* 433; 8 *D. & R.* 43.

With respect to the mode of proving the privity of estate or tenancy, mere proof of *payment of rent* by deft. to the claimant is strong *prima-facie* evidence of it, and of the claimant's title: see *Fenner v. Duplock*, 2 *Bing.* 10. It is not, however, conclusive evidence thereof, and the deft. may still dispute the tenancy, where there is no proof that the claimant was his original lessor; as, by showing the payment was made under a mistake or misrepresentation: *Williams v. Bartholomew*, 1 *Marsh.* 541; 1 *B. & P.* 326; 7 *Moo.* 299; *Gregory v. Davidge*, 3 *Bing.* 475; 2 *Stark.* 230. Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has had notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless it be proved that, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired: *Fenner v. Duplock*, 2 *Bing.* 10. The effect of payment of rent, or an attornment, may be destroyed by the subsequent non-claim of rent for a number of years, and by showing a strong ground to suspect the title of the party to whom the payment or attornment was made, particularly if it was not given voluntarily, but to prevent the continuance of an ejectment: 7 *Moo.* 289. The deft. should be served with a notice to produce his receipts for rent, and the service of such notice should be proved.

The privity of estate or tenancy is conclusive, if proved by showing the original demise from the claimant. If the same was by *parol*, the person present (if any) at the time of the making it, and who can speak to the fact, should be subpœnaed, or it may be proved by deft.'s admissions: *ante*, *Admissions*. The payment of rent, as such, is *prima-facie* evidence of a contract of renting, and of the terms of such contract: *supra*; 1 *T. R.* 161; 3 *East*, 270; 10 *East*, 261; 2 *N. R.* 247, 3 *M. & S.* 250; 3 *B. & C.* 413; 6 *D. & R.* 273, *s. c.*; and see 2 *B. & C.* 100; 3 *D. & R.* 293, *s. c.* Evidence of the submission to a distress for rent, stated in the notice of distress to be due from the deft. to the claimant, is sufficient to show a tenancy under such party: 3 *Camp.* 372. As to what amounts to an implied tenancy, or a mere agreement for a lease, see *post*, "*Landlord and Tenant*." If the demise was by deed or in writing, such deed or writing should be produced and proved in the usual way, see "*Deed*," "*Writing*," or else secondary evidence of it: *post*, "*Secondary Evidence*."

*Determination of Tenancy by NOTICE TO QUIT—When necessary.*]

In the common name, the notice should have been in the name of his first lessee; no privity existing between the original landlord and the sub-lessee: *Pleasant d. Hayton v. Benson*, 14 *East*, 234. The representatives of a tenant from year to year are invested with every interest the tenant might have had in the premises, and are entitled to a notice to quit from the person under whom their testator or intestate held: *Doe d. \*Shore v. Porter*, 3 *T. R.* 13; *R. v. Inhab. of [\*465] Stowe*, 6 *ib.* 297; *Parker d. Walker v. Constable*, 3 *Wils.*

25. And, if the landlord die pending the tenancy, yet the lessee is en-



titled to the same notice from the party to whom the interest in the premises has descended, though he be an infant: *Maddon d. Baker v. White*, 2 T. R. 156. In the common cases of tenancies of houses or lands from year to year, a notice to quit will be necessary to determine such tenancy, and the party cannot be ejected without such notice: *Doe d. Warner v. Brown*, 8 East, 165; 1 T. R. 195. As to lodgings, see *post*. Though the lessor enter into an agreement not to determine the tenancy by a notice to quit, yet he may still do it: *Doe d. Rigge v. Bell*, 5 T. R. 471. In the case of an underlease, where a tenant, from year to year, underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, it was held, the landlord could not recover against his sub-lessee, upon giving half a year's notice to quit in his own: *Adams*, 116. Where a tenant was let into possession before the execution of a mortgage, he will be entitled to a notice to quit from the mortgagee previous to ejectment being brought against him: *semb. Thunder d. Weaver v. Belcher*, 3 East, 449, *infra*. If there be a lease for a year, and by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract, and a notice to quit will be necessary: *Right d. Flower v. Darby*, 1 T. R. 159. Where a rector succeeded to a rectory upon the death of the former incumbent, and defts. were then in possession of the glebe lands, having been tenants of the former incumbents, a notice to quit was held necessary, and, where the rector conveyed the lands to a trustee, for the purpose of securing an annuity, a notice from such trustee will also be necessary previous to his ejecting them, *Doe d. Cates v. Somerville*, 6 B. & C. 126, 9 D. & R. 100; the principle governing these cases being that the tenancy has been affirmed by the persons subsequently becoming entitled to the premises. So, if a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainder-man; but, if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admission that deft. is his tenant, and a notice to quit will be necessary to determine the tenancy: *Doe d. Martin v. Watts*, 7 T. R. 83; 2 Esp. Rep. 500, s. c.; *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *Denn d. Brune v. Rawlins*, 10 East, 261.

*When Notice to Quit not necessary.*] In general, no notice to quit is necessary to determine a tenancy of lodgings, unless the tenant expressly agree for such notice, or be a tenant from year to year, or more: see 3 B. & C. 88; 4 D. & R. 493, s. c. No notice to quit is deemed requisite where the tenancy expires by effluxion of time, or the happening of a particular event, specified in the terms of leasing; both parties being apprised when such period arrives, or the event happens, that, unless they come to a fresh agreement, there is an end of the lease: *Messenger v. Armstrong*, 1 T. R. 53; *ib.* 162; *Cobb v. Stokes*, 8 East, 358. Where a tenant has attorned to another person, or done any act disclaiming to hold of his landlord, he may be treated as a trespasser, and no notice to quit will be requisite, *B. N. P.* 96, *Doe d. Williams v. Pasquali*, *Pea. Rep.* 259, *Bower v. Mayor*, 1 B. & B. 4; as, between

mortgagee and mortgagor, after forfeiture of the mortgage, no notice to quit is necessary, *Birch v. Wright*, 1 T. R. 383, *Moss v. Gallimore*, Doug. 279; and it is the same in the case of under-tenants of the mortgagor, *Doe d. Shepherd v. Allen*, 3 Taunt. 78, *Keech d. Warne v. Hall*, Doug. 21, if they have been let into possession after the execution of the mortgage, and without the privity of the mortgagee, *ib.*, *ibid.*; and so with the assignees of a mortgagee, *Thunder d. Weaver v. Belcher*, 3 East, 449. No notice is ever requisite where \*the [466] relation of landlord and tenant does not subsist: the payment of rent will, in some cases, be evidence of a tenancy, so as to render a notice necessary, but not so if it be paid and received altogether on another account, and not strictly as between landlord and tenant: *Right d. Dean and Chapter of Wells v. Bawden*, 3 East, 260, 276. Nor is it necessary where a person has wrongfully possessed himself of plt.'s property, though a negotiation as to terms had been attempted to be entered into, as he was only a tenant by sufferance, *Doe d. Knight v. Quigley*, 2 Camp. 505; but, if he be put into possession upon an agreement to purchase the premises, a notice might be deemed requisite, *Right d. Lewis v. Beard*, 13 East, 210; and it seems to be a general rule that a reasonable demand of possession is necessary where a party is let into possession under an agreement for a lease, 13 East, 210, 3 Taunt. 148. It will not be necessary to give notice to a vendee to quit, who has agreed to pay the purchase-money by instalments, where the vendor was not compelled to convey, if default was made in the payment of any of the instalments: *Doe d. Moore v. Lawder*, 1 Stark. 308; *Doe d. Leeson v. Sayer*, 3 Camp. 8. Where, by the terms of a deed of copartnership, premises were to be occupied during the continuance of the partnership, and the partnership is dissolved, no notice to quit is necessary: *Doe d. Waithman v. Miles*, 1 Stark. 181. Where the lessor of the plt. claimed under an *elegit* and inquisition issued in 1818, but founded on a judgment recovered prior to 1816, it was held, no notice need be given to a tenant who was in possession in 1816: *Doe d. Putland v. Hilder*, 2 B. & A. 782. Where a notice was given to a *feme sole*, previous to the expiration of which she married, no notice was considered necessary to be given to the husband: *Lake v. Smith*, 1 N. R. 174; *Wilkinson v. Colley*, 5 Burr. 2694. We have seen that the representatives of a deceased tenant are entitled to the same notice to which their tenant had a right, because the tenant's interest in the term vests absolutely in them; but where an agreement had been made that a tenant was to occupy premises during the life of the lessor, either by himself or by a tenant, agreeable to the lessor, and the tenant died, being himself possessed at the time of his death, it was held his interest ended with his life, and that ejectment was well brought against his executrix, without any notice to quit: *Doe d. Bromfield v. Smith*, 6 East, 536. Where no notice is necessary, but one has been given, yet it is not binding, and the lessor of the plt. may proceed as if there had been none: *Doe d. Godsell v. Inglis*, 3 Taunt. 54.

*Time of giving and for Expiration of Notice.*] If the holding be from year to year, it is necessary the notice be given half a year previous to that period of the year when the tenancy commenced, *Right d.*

*Flower v. Darby*, 1 T. R. 159, 163, 8 East, 165; and the notice must be to quit at the expiration of that period. The half-year must be six calendar months, or 182 days: *ib.*; *Doe d. Harrop v. Green*, 4 Esp. Rep. 199; *Howard v. Wemsley*, 6 *ib.* 53; *Gulliver d. Tasker v. Burr*. 1 W. Bl. 596. If a house be taken "at twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by six months' notice to quit, expiring at the end of the first year: 2 Camp. 573. A notice to quit on one of two days is sufficient, if six months intervene previous to the expiration of the first day: *Doe d. Mathewson v. Wrightman*, 4 Esp. Rep. 5. A notice to quit at Lady Day, 1795, given at Michaelmas, 1795, will be good; for it will be taken to mean 1796, *Doe d. Bedford v. Knightley*, 7 T. R. 63, 1 Chit. Rep. 11; and notice to a tenant from year to year, holding from old Michaelmas, to quit at Michaelmas, will be good, *Doe d. Hinde v. Vince*. 2 Camp. 256, if it be a parol lease, but not if it be by deed: *Doe d. Spicer v. Lea*, 11 East, 312. The terms of the tenancy may require a less period than a half-year's notice; as if the tenant be a monthly or weekly one, a month or week's [467] notice is sufficient: *Kemp v. Derrett*, 3 \*Camp. 510; *Doe v. Hayell*, 1 Esp. Rep. 94; *Doe v. Raffan*, 6 Esp. Rep. 4; 3 B. & C. 88; 4 D. & R. 693; 2 Camp. 573. Where premises are taken under an agreement, by which "the tenant is always subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the end of any quarter from the time of his entry: 3 Camp. 510. But, on the letting of a house from "year to year, to quit at a quarter's notice," such notice must expire at the period of the year at which the tenancy commenced: 2 Camp. 78; 1 Taunt. 555, s. c. There is no distinction as to giving notice, whether the premises be houses or lands: *Right d. Flower v. Darby*, 1 T. R. 162. But, as to lodgings, see *ante*, 465. Where an incoming tenant enters upon different parts of the demised premises at different times, the giving half a year's notice to quit before the substantial time of entry is sufficient: *p. Ld. Ellenb.*, *Doe d. Bradford v. Watkins*, 7 East, 554; *Doe d. Strickland v. Spence*, 6 *ib.*, 120; *Doe d. Heapy v. Howard*, 11 *ib.*, 498. A lease of lands by deed, since the new style, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, and cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas; and a notice to quit at Old Michaelmas, though given half a year before New Michaelmas, is bad: *Doe d. Spicer v. Lea*, 11 East, 312. But, under a parol lease, evidence will be admitted to explain a difficulty as to the commencement of the holding: *Doe d. Hall v. Benson*, 4 B. & A. 588; *Den d. Peters v. Hopkinson*, 3 D. & R. 507, 1 Esp. Rep. 198. If a remainderman affirm a letting which he might have avoided, he must give a notice to quit, expiring at the period of the year the tenant entered: 7 T. R. 83, 478; 2 Esp. Rep. 502; 1 H. Bl. 97. If a tenant hold under an agreement for a lease, at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself, when he comes of age, the son must make his election in a reasonable time after he comes of age: the delay of a year is unreasona-

ble, and the tenant cannot be ejected upon half a year's notice to quit, served after such delay: *Doe d. Bromfield v. Smith*, 2 T. R. 436.

Where there has been an express agreement, the time of giving notice should be regulated by it: *Doe d. Pitcher v. Donovan*, 1 Taunt. 555, s. c.; 2 Camp. 78; *Kemp v. Derret*, 3 ib. 510. In some cases, it may be regulated by the custom of the place where the tenement is situate: *Timmins v. Rawlinson*, 3 Burr. 1609; 2 Sid. 20; *Roe v. Charnock*, Pea. Rep. 5. The presumption of law is, that the tenancy commenced when the tenant entered in the premises, though he took possession in the middle of the usual quarter days, 3 Camp. 510; but if a tenant entered in the middle of a quarter, and afterwards pay for the time to the beginning of the succeeding regular quarter, from which time he pays half-yearly, it shall be presumed that his tenancy began from the first regular quarter-day: 6 Esp. Rep. 10. A receipt for a year's rent, up to a particular day, is *prima-facie* evidence of a holding from that day: *Doe v. Samuel*, 5 Esp. Rep. 174.

Where the tenant purposely or inadvertently gives such information to his landlord as induces him to suppose the tenancy to have commenced at a particular time, the tenant is precluded from afterwards objecting to the notice, for a mistake in that respect: *Doe d. Eyre v. Lambly*, 2 Esp. Rep. 636. When, also, the tenant, at the time of the service of the notice, assents to the terms of it, he will be precluded from showing it expires at a wrong time; but such assent must be strictly proved: and, in a case where the party made no objection to the notice at the time of its delivery, but said, "I pay rent enough already—it is hard to serve me thus," it was held, that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced: *Oakapple v. Copous*, 4 T. R. 361. Where, however, the tenant is *personally* served with, and *\*reads* the notice, and [\*468] does not object to the time he is required to resign possession, it will, in general, be presumed, against him, that the notice is correct in that respect: 2 Camp. 647; 13 East, 405; 2 Taunt. 109. As to landlord's waiver of irregular notice by tenants, see 1 Esp. Rep. 266.

*Form of Notice.*] It is not necessary that any particular form of notice be adhered to; any statement, however short, is sufficient, provided it mention the period at which it is intended the tenant should quit; and the period so mentioned must be the last day of the tenancy, *Doe d. Mathews v. Jackson*, Doug. 167, *Doe d. Morgan v. Church*, 3 Camp. 71; and, if it be a parol lease, the notice need not be in writing, *Timmins v. Rawlinson*, 3 Burr. 1603, 1 W. Bl. 533, s. c.; except it be specified so to be by agreement between the parties, or by the provisions of a power, *ib.*, *Legg v. Benton*, Willes, 43. The notice will be good, if it state that the tenancy will expire in so many months' time from the date of the notice, *Doe d. Phillips v. Butler*, 2 Esp. Rep. 589; and, though a palpable mistake be made in the notice, as substituting one year for another, yet if, in other respects, it be good, the erroneous part will be rejected, and the notice will be deemed sufficient: *Doe d. Bedford v. Knightly*, 7 T. R. 63. A notice to quit on one of two days will be good, *Doe d. Mathewson v. Wrightman*, 4 Esp. Rep. 5; and, though the premises be wrongly described, yet, if the party upon whom

the notice is served, cannot be misled by it, it will be good : *Doe v. Cox*, 4 *Esp. Rep.* 185. A notice dated the 27th, and served on the 28th of September, requiring a tenant to quit "at Lady Day next, or at the end of this current year," will be understood to mean a six months', and not a two days' notice : *Doe d. Huntingtower v. Culliford*, 4 *D. & R.* 249. A notice to quit part of the premises will not be a good notice : *Doe d. Rodd v. Archer*, 14 *East*, 245. Where a house, lands, and tithes, are held under a parol demise, at a joint rent, a notice to quit the house, lands, and premises, with the appurtenants, has been held to include the tithes, and sufficient to close the tenancy : *Doe d. Morgan v. Church*, 3 *Camp.* 71. Where a notice, signed by the rector and churchwardens of a parish, was delivered to a tenant of lands, originally devised to the rector and churchwardens, and their successors, in trust, requiring him to deliver up the premises "to the rector and churchwardens for the time being," it was held bad for uncertainty ; as the deft., by the terms of the notice, could not know to whom he was to deliver up the possession : *Doe d. Brooks v. Fairclough*, 6 *M. & S.* 40. A notice to quit to a tenant, by a wrong name, is not a good notice, *Doe v. Spiller*, 6 *Esp. Rep.* 70 ; but, if he do not return it, it will be a waiver of the misdirection, *ib.*; and see *ante*, 467, as to what will be a waiver of irregularity in notice.

*By whom Notice to be given.*] The notice may be given by the lessor himself, or by any person interested in the premises, or by the lessor's agent or steward, *Roe d. Dean and Chapter of Rochester v. Pierce*, 3 *Camp.* 96; and no authority need be shown to warrant a person's giving notice who apparently acts under due authority, for, by bringing the action, the authority of the person is adopted and recognized : *ib.* Where, however, no authority is apparent, a ratification afterwards will not be sufficient, "as the tenant is entitled to such notice as he can rely upon with certainty at the time it is given, and he is not bound to submit himself to the hazard of the party's ratifying the notice, under whose supposed authority it had been originally given : " *p. Ld. Ellenb., Right d. Fisher v. Cuthell*, 5 *East*, 496-9. Where a notice has been given by the agent of two joint landlords, a recognition by one of them will be sufficient : *Goodtitle d. King v. Woodward*, 3 *B. & A.* 689; *Doe d. Jolliffe v. Sybourn*, 2 *Esp. Rep.* 877. Joint tenants must join in a notice to quit; for, when two of four persons, jointly interested in the premises, only give notice, the notice will be good merely as far as their own portion of the property may be [\*469] \*concerned : *Doe d. Wayman v. Chaplin*, 3 *Taunt.* 120.

A receiver, appointed by the Court of Chancery, with a general authority to let the lands to tenants, has also authority to deliver the tenancies by a notice to quit : *Doe d. Marsack v. Read*, 12 *East*, 57; *Wilkinson v. Colley*, 5 *Burr.* 2697. Notice may be given by an infant : *Maddon d. Baker v. White*, 2 *T. R.* 159. As to who should give notice in the case of an underlease, see *ante*, 465.

*To whom, and how Notice to be given.*] Personal service of the notice is, in general, necessary. Service of a notice, leaving it at the dwelling-house of the tenant, has always been deemed sufficient. *p. Ld. Kenyon, Doe d. Griffith v. Marsh*, 4 *T. R.* 465 ; but, where a notice

was left at the house of the tenant, and delivered to a servant, without any explanation, and no proof was shown that it came into the hands of the tenant, *Ld. Ellenb.* held it insufficient; because, if such practices were deemed sufficient, the tenant might be turned out of possession by a trick: *Doe d. Buross v. Lucas*, 5 *Esp. Rep.* 153. But, in a late case, it was held, that service on a servant, at the tenant's dwelling-house, was sufficient, although the tenant was not informed of it till within half a year of its expiration: *Doe v. Dunbar*, 1 *M. & M.* 10. A service upon the officers of a corporation will be a good service, when the lands are held by the corporation: *Doe d. Carlisle v. Woodman*, 8 *East*, 227. The notice was deemed insufficiently served, when it was upon a relative of the lessee's upon the premises, although addressed to the original lessee: *Doe v. Levi, Adams, Eject.* 115. In the case of several tenants, a notice served upon one is sufficient service: *Doe d. Bradford v. Watkins*, 7 *East*, 551; *Doe d. Macartney v. Crick*, 5 *Esp. Rep.* 196. Where a notice was misdirected, but served upon the tenant, and he made no objection, but kept the notice, *Ld. Ellenb.* held him to be bound by it, as he might have repudiated it, had he chosen: *Doe v. Spiller*, 6 *Esp. Rep.* 70; *ante*, 467, 8. Where there are under lessees, the notice must not be served upon them, but upon the landlord's immediate lessee: *Pleasant v. Benson*, 14 *East*, 234; *Roe v. Wiggs*, 2 *N. R.* 330. But it may be served upon the widow of a tenant from year to year, who remains after her husband's death, without showing that she is executor or administrator of the deceased: *Rees v. Perrot*, 4 *C. & P.* 230.

*Mode of Proving Notice.*] The service of it, and the authority to serve it, should be proved by the party serving it. If there have been an attesting witness to the notice, he must be called, and his hand-writing proved, or else his absence must be duly accounted for: *post*, "Witness." The notice itself must be proved to have been properly signed; proof of its merely being served on the tenant and that he read it, without making any objection, will not be sufficient: *Doe d. Sykes v. Durnford*, 2 *M. & S.* 62. The notice itself may be proved by a duplicate original, or by the production of an examined copy, or by parol evidence, if there be no duplicate or copy. *Kine v. Beaumont*, 3 *B. & B.* 288. A notice should be served on the deft. to produce it, and the service of such notice proved: but this seems not to be absolutely necessary: 2 *B. & P.* 41. If it be in the possession of a third party, he should be subpoenaed to produce it. When the notice was given by an agent, it should be proved he was vested with his authority at the time of giving the notice. Where a notice to quit was given by a steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice, *Doe v. Pearce*, 2 *Camp.* 96; but, where two or more tenants are lessors of the plt., and a notice to quit is given by one or more, in the name of all, although they all afterwards join in the ejectment, it will not be presumed from that circumstance, that an authority was originally given by the parties not joining in the notice to their co-tenants: *Right v. Cuthell*, 5 *East*, 491; see *Adams*, 274.

*How Notice may be Waived.*] The paying and receiving [\*470] money, *\*eo nomine*, as rent for a portion of a term of the tenancy, *after* the expiration of the period mentioned in the notice to quit, has been deemed a waiver of the notice, where the giving notice would have been a necessary step to commencing the action, *Goodright d. Carter v. Cordwent*, 6 T. R. 219; though the mere acceptance of rent for the occupation of the premises, subsequent to the time when the term ended, according to the notice, will not, of itself, waive the notice, but will be evidence for a jury: *Doe d. Cherry v. Batten*, *Cowp.* 242. The making a distress for rent, accrued after the expiration of the notice to quit, is not a question for a jury; it is an act not to be qualified, as the acceptance of rent may be, but is a direct waiver of the notice, *Zouch d. Ward v. Withingdale*, 1 H. Bl. 311; but the bringing an action of covenant for such rent will be a waiver: *Roe v. Minshull*, *B. N. P.* 96; 2 *S. N. P.* 677. The giving a second notice, after service of the first, is not a waiver of the first, for the lessor may do it to make his right to recover doubly sure, and the tenant is bound to abide by the first notice, if unobjectionable: *Doe d. Williams v. Humphreys*, 2 *East*, 237; *Messenger v. Armstrong*, 1 T. R. 54; *Doe d. Digby v. Steel*, 2 *Camp.* 117. The receipt of rent by a banker, who is ignorant of any steps having been taken by his principal, to determine the tenancy, as by a notice to quit, is not a waiver of the notice, *Doe d. Ash v. Calvert*, 2 *Camp.* 387; though, if an authorized agent receive rent, due at Michaelmas, it is, *prima facie*, a waiver of a notice to quit at Midsummer: *ib.* The payment of rent due before, though made after the notice, is not a waiver, *B. N. P.* 96, *b.*; nor the making a distress under the same circumstances: *Adams, Eject.* 139. A second notice to quit, to quit, is a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment: *Doe d. Brierly v. Palmer*, 16 *East*, 53. Giving a notice to quit, and, at the same time, stating that he would not, till the happening of a certain event, exercise his right, is not a waiver: *Whiteacre d. Boulton v. Symonds*, 10 *East*, 13. If, at the end of a tenancy from year to year, the party accept another person as tenant, without any surrender in writing, such acceptance shall be a dispensation of any notice to quit: *Sparrow v. Hawkes*, 2 *Esp. Rep.* 505. A recovery for the use and occupation of the premises, after the expiration of the notice, is not a waiver: *Birch v. Wright*, 1 T. R. 387.

*Proof of Determination of the Tenancy by FORFEITURE.*] To support ejectment on a forfeiture of a lease, by non-performance of covenant, if the covenant be to do an act, the lessor of the plt. must prove the tenancy, and give some evidence of the omission of the act. Where a particular of the breaches has been given, the proof must be according to the terms of the particulars: *Doe v. Phillips*, 6 T. R. 597. A slight variance, if it do not mislead, is immaterial, as a variance in the amount of rent proved to be due, and that claimed in the particulars: *Jenny v. Moody*, 3 *Bing.* 3.

If the breach of covenant be for non-payment of rent, the lessor of plt., if he proceeds at common law, must prove that he has complied with all the formalities required by it, as a demand of the rent: *Doe d. Chandless v. Robson*, 2 *G. & P.* 246. That the demand was of the pre-

cise rent due, 1 *Saund.* 287, and that it was made on the precise day on which it became due, *Co. Lit.* 202, or that it was made on the land, and at a convenient time before sunset, &c., see 1 *Saund.* 287. If he proceeds on the 4 *G.* 2, c. 28, s. 2, which does away with these formal proceedings at common law, he must prove that half a year's rent be due before the service of the declaration, and that there was no sufficient distress upon the premises to answer the arrears of rent then due, and that the lessor had power to re-enter. The plt. must, however, still prove a demand of the rent, though he proceeds under this act, if the lease expressly require it: *Doug.* 486; 5 *D. & R.* 711; 3 *B. & C.* 752. Upon a lease, reserving rent payable quarterly, with a proviso, that, if the rent be in arrear twenty-one days next after day of payment, being \*lawfully demanded, the lessor may re-enter, it [\*471] was held that, five quarters being in arrear, and no sufficient distress upon the premises, lessor might re-enter without a demand: *Doe d. Scholefield v. Alexander*, 2 *M. & S.* 525; *Doe d. Shrewsbury v. Wilson*, 5 *B. & A.* 384. Under a proviso in the lease for the entry of the landlord, in case the rent should be in arrear fourteen days, and no distress found upon the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at Lady Day, and no distress on the premises on some day in May, the demise being laid on the 2d of May, and the declaration served on the 6th of June: *Doe d. Smelt v. Fuchsau*, 15 *East*, 286. The insufficiency of the distress must be clearly established, if the plt. proceed under this act, and every part of the premises must be searched, see 7 *T. R.* 117; *Rees v. King*, 2 *B. & B.* 514; *Forrest*, 19.

If the ejectment be for the breach of any other covenant, the claimant must show the covenant broken, by the same proof as in an action of covenant: see "*Lease*."

If it be for *not repairing*, the non-repairs must be proved by a competent party, usually a surveyor. If a notice to repair has been served, such service should be proved, and deft. served with a notice to produce it, proving also the service: see *infra, post*, "*Secondary Evidence*." If the covenant be to keep and leave the house in as good a plight as it was in at the time of making the lease, ordinary and natural decay is no breach of the covenant, the covenanter being only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c.: *Sheph. Touch.* 169. Breaking a door-way through the wall of a demised house, into an adjoining one, amounts to a breach of covenant to keep in repair: *Doe v. Jackson*, 2 *Star.* 293. Broken windows or doors are evidence of the breach to keep in repair, *Co. Lit.* 57, a., 2 *Saund.* 352, a. 7; but it should seem, in all cases, the non-repair must have existed a reasonable time. Where there is an express and unconditional covenant to repair, the tenant is bound to do so within a reasonable time, though the premises be destroyed by fire, or other accident: *Aleyn*, 27; 6 *T. R.* 650, 750; *Com. R.* 626; 4 *Taunt.* 45; *Sheph. Touch.* 173. A covenant to keep in repair is broken, and the party may be ejected, for not repairing within the term: *Luxmore v. Robson*, 1 *B. & A.* 584. As to what is a waiver of a breach of covenant to repair, and when plt. bound by his notice to repair, see *post*, 473.



If the breach of covenant be for *not insuring*, the insurance offices in which the insurance should have been made, should be searched, and it should be established no insurance has been made there. In ejectment on a forfeiture for not insuring, the lessee having covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises devised, and the lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of premises, both parts of the lease remaining in the possession of the lessor, and an abstract only having been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value of the premises, and the lessor of the plt. had previously insured the premises at the same sum as the deft., it was held that, the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him, in insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release: *Doe v. Rowe*, 1 R. & M. 343.

On a clause of re-entry, in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove the deft. a stranger, in possession of the premises, *Doe v. Payne*, 1 Stark. 86; but see *Doe d. Haidly v. Rickarby*, where it was held, that, if a person be \*found on the premises, appearing as the tenant, it is *prima-facie* evidence of an underletting, sufficient to call upon deft. to show whether the person so holding was either in the capacity of a tenant or a servant: 5 Esp. 4.

Where the terms of the lease were "not to set, let, or assign over the whole or part of the premises, without leave in writing," an under-lease was considered a forfeiture, and a parol license to let part of the premises does not discharge the lessee from the restriction of such a proviso: *Roe d. Gregson v. Harrison*, 2 T. R. 425. But a covenant "not to assign, transfer, set over, or otherwise do or put away the lease," was held not to extend to an under-lease for the term: *Crusoe d. Blencowe v. Bugby*, 2 W. Bla. 766; 3 Wils. 234, s. c. Covenant in a lease "not to let, set, assign, transfer, set over, or otherwise part with the premises thereby demised, or that present indenture of lease:" held, that a deposit with a creditor, as a security for money advanced, was not a "parting with," within the meaning of the covenant: *Doe d. Pitt v. Laming*, R. & M. 36; *Doe d. Pitt v. Hogg*, 4 D. & R. 225; 1 C. & P. 160, s. c. It is said, that a devise of the terms by the lessee is not a breach of the covenant not to assign: *Crusoe d. Blencowe v. Bugby*, 3 Wils. 234; *Doe d. Good-behere v. Bevan*, 3 M. & S. 361; *Berry v. Taunton*, Cro. E. 331. When a lease contained a proviso for re-entry, in case the tenant should devise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, &c., to any person whomsoever, for all or any part of the term, without the license of the lessor in writing, and the deft., without such license, agreed with a person to enter into partnership with him, and that he should have the use of the back chamber, and some other parts of the premises *exclusively*, and of the rest jointly with deft., it was held, a forfeiture had taken place, and the lessor was entitled to

re-enter: *Roe d. Dingley v. Sales*, 1 *M. & S.* 297. But letting lodgings is not a breach of a covenant not to underlet: *Doe d. Pitt v. Laming*, 4 *Camp.* 77. Any act, usually constituting a breach of covenant, has been held not to have that effect, if done by compulsion of law. So, where a lessee who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, held, no forfeiture of the lease, Lord Kenyon observing, "judgments, in contemplation of law, always pass *in invitum*; and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expense of the proceeding: *Doe d. Mitchinson v. Carter*, 8 *T. R.* 57, 61. So, an assignment under a commission of bankruptcy is not a breach of a condition not to assign: *Doe d. Goodbehere v. Bevan*, 3 *M. & S.* 353. And so, where a lease contained a proviso for re-entry of the lessor, and the lease should be void on the lessee's assigning without the license of the lessor, and the lessee, in January, 1825, executed a deed, which purported to convey all his real and personal property to trustees, for the benefit of his creditors; and, in April, 1835, a commission of bankruptcy issued against the lessee, held, that the deed was an act of bankruptcy, and void, and that it did not operate as a valid assignment of the tenant's interest in the lease, and therefore there was no forfeiture: *Doe d. Lloyd v. Powell*, 5 *B. & C.* 318.

*Waiver of Forfeiture.*] The receipt of rent, as such, will be a waiver of the forfeiture, if the rent accrue after the forfeiture; but the receipt of money as a remuneration for the use and occupation of the premises, after the forfeiture, will not; it will be a question for a jury whether the money was taken as rent: *Goodright v. Cordwent*, 6 *T. R.* 119; *Doe v. Batton*, *Cowp.* 243. Acceptance of rent, however, will not operate as a waiver of the forfeiture, or a confirmation of the tenancy, unless \*notice have been given to the land- [\*473] lord that a forfeiture was incurred at the time: *Roe d. Gregson v. Harrison*, 2 *T. R.* 425; *Goodright d. Walter v. Davids*, *Cowp.* 804. Bringing an action of covenant for rent accrued after forfeiture is a waiver; for, by bringing the action of covenant on the lease, he admits the deft. to be tenant in possession by virtue of that lease: *Roe d. Crompton v. Minshull*, *B. N. P.* 96. Making a distress on the premises for rent accruing after the forfeiture, is a waiver: *Zouch d. Ward v. Willingdale*, 1 *H. Bl.* 311; *Doe d. Taylor v. Johnson*, 1 *Stark.* 411. The making an insufficient distress for rent, the non-payment of which caused the forfeiture, will not be a waiver of the forfeiture: *Brewer d. Onslow v. Eaton*, 6 *T. R.* 220. Mere knowledge and acquiescence in an act, constituting a forfeiture, does not amount to a waiver; there must be some act affirming the tenancy. So, where a lessee exercised a trade on the demised premises, by which his lease is forfeited, the landlord does not waive the forfeiture, by lying by and witnessing the act for six years: *Doe d. Sheppard v. Allen*, 3 *Taunt.* 78; *Pennant's case*, 3 *Rep.* 64. A lessor, having a right of re-entry, on breach of covenant not to underlet, does not, by waiving his security on one underletting,

also waive his right to re-enter on a subsequent underletting: *Doe d. Boscawen v. Bliss*, 4 Taunt. 735. Where there was a general covenant, on the part of the tenant, to keep the premises in repair, and a further stipulation that he would, within three months after notice given him, repair all defects specified in the notice, the giving a notice to repair "forthwith," was not considered a waiver of the forfeiture, and the party was held entitled to bring ejectment, even before the expiration of the three months, *Roe d. Goatley v. Paine*, 2 Camp. 520; but, where the notice was, in a similar case, to repair within three months, it was held to be a waiver of the forfeiture till the expiration of the three months: *Doe d. Morecraft v. Meaux*, 4 B. & C. 606. Where a forfeiture by a tenant for years, in levying a fine, has not been taken advantage of by the reversioner, it cannot be taken advantage of, after the reversion has been conveyed away, so as to recover on the demises of the grantor and grantees of such reversion: *Fenn d. Mathews v. Smarth*, 12 East, 444.

#### BY ASSIGNEE OF REVERSION.

In this case, after proving the forfeiture, as in ejectment by the landlord, evidence must be given that the claimant is entitled to the reversion at the time the forfeiture was committed, and, if possible, of the mesne assignments from the original lessor; *Adams*, 278, 9. These mesne assignments, however, will be presumed, if the original lease be for a long time, and the possession of the assignee has continued for a considerable time: *Earl v. Baxter*, W. Bl. 1228; *Adams*, 279.

At common law, an assignee of the reversion could not maintain an ejectment upon a right of re-entry for condition broken; but this was remedied by the 32 H. 8, c. 34. The statute, however, only empowers the assignee to bring an ejectment for a breach of such conditions only as are incident to the reversion, or for the benefit of the estate: *Co. Lit.* 215, b.; *Sir T. Raym.* 250. The statute extends to persons only who have the immediate reversion, or remainder in fee-tail, or for a less estate: 1 Saund. 322; 2 Saund. 252, b. A *cestui-que use*, and bargainee of the reversion, are within the act; but persons coming in by act of law are not: *Co. Lit.* 215, b.; *Adams*, 70. The assignee of the part of the reversion in all the premises demised, is within the act; but not the assignees of the reversion in part of the lands: *ib.* Copyhold lands are within the act, *Carth.* 205; but not gifts in tail: *Co. Lit.* 215, a.

#### BY MORTGAGEE.

In ejectment by mortgagee against mortgagor, on a forfeiture of the mortgage, no notice to quit need be proved, *Birch v. Wright*, [\*474] 1 T. R. \*378, *Moss v. Gallimore*, Doug. 279, 282; and, in an action against the tenant of the mortgagor, no notice to quit is requisite, except where the mortgagee has impliedly admitted him as his tenant: *Keech v. Hall*, Doug. 21; see, further, *ante*, 465. Where the mortgagor is in possession, the production of the mortgage-deeds will substantiate the mortgagee's title, because a party cannot set up a title inconsistent with his own deed, *Doug.* 21; but, if there be under-tenants of the mortgagor in the occupation of the premises, the mortga-

gee must, in addition to the mortgage, also prove that they have paid rent to, or recognized the holding under, the mortgagor: *S. N. P.* 748; *Birch v. Wright*, 1 *T. R.* 378; *Thunder d. Weaver v. Belcher*, 3 *East*, 449. If the third person holds by a title adverse to that of the mortgagor, evidence of the mortgagor's title will be required.

#### BY LORD OF MANOR.

In ejectment by the lord of a manor for a forfeiture, it must appear that the forfeiture arose when he was lord, and that the tenant committing it was his tenant on the rolls of the manor, *Roe d. Jefferys v. Hicks*, 2 *Wils.* 13, *B. N. P.* 108, *Doe d. Tarrant v. Hellier*, 3 *T. R.* 173; and the forfeiture must also appear to have been committed within twenty years; for, it is said, "the lord cannot enter for a forfeiture at the distance of more than twenty years," *per Buller, J., ib.* If he bring ejectment for mines upon his manor, he must prove possession to have been in him within twenty years, "because they are a distinct possession from the manor, and may be of different inheritances," *per curiam*, *Rich d. Cullen v. Johnson*, 2 *Str.* 1142; "and a verdict, in trover, for lead dug out of the mine, is no evidence of possession, for trover may be brought on property without possession:" *B. N. P.* 102. Where a tenant incloses part of a waste for twelve or thirteen years, and is seen by the steward of the lord of the manor, from time to time, without objection made, it may be presumed to have been with the license of the lord, and no action will lie by the lord without previous notice to throw it up: *Doe d. Foley v. Wilson*, 11 *East*, 56. If land be seized absolutely by the lord, as forfeited *pro defectu tenentis*, a special custom must be proved, entitling him to do so, but no custom need be proved if he only seize *quousque*; and, if an absolute seizure be made, and the custom not proved, such seizure cannot afterwards be set up as a seizure *quousque*; the proclamations must also be proved to have been made: *Doe d. Tarrant v. Hellier*, 3 *T. R.* 162; *Lord Salisbury's case*, 1 *Lev.* 63; 1 *Keb.* 287, *s. c.*

#### Evidence for Defendant.

Much of the deft.'s necessary evidence may be collected from the foregoing, and will consist in rebutting the plt.'s evidence, by calling fresh witnesses or cross-examining plt.'s. The deft. need never show a better title in himself, or indeed in any other person; if he controvert, or show no title to exist in the plt. it will be sufficient, *Tregonwell v. Strachan*, 5 *T. R.* 110; *Graham v. Peat*, 1 *East*, 246; or deft. may show that plt. has only an equitable estate: *Goodtitle v. Jones*, 7 *T. R.* 49; *Roe v. Read*, 8 *ib.*, 118, *ante*.

In an action by the heir at law, deft. may show the claimant's illegitimacy: 8 *East*, 193; *Goodright d. Thompson v. Saul*, 4 *T. R.* 356. Want of access, or presumptive evidence of it, or other circumstances tending to show the husband could not, in the course of nature, have been the father of his wife's child, are good evidence: 8 *East*, 206; 4 *T. R.* 356. The marriage under which claimant claims may be shown to be void: 2 *Phil.* 235.

Where the lessor of the plt. claims as a devisee, deft. may show that

the will is void, by its being forged, or by the incapacity of the testator to make a will; or he may show that it has been revoked: *post*, "*Will*."

\* The deft. may also, in all cases, show that the claimant's [\*475] right of possession and entry is taken away by discontinuance, descent cast, or the Statute of Limitations: *see Adams, Eject. 35.*

*Right of Entry barred by Discontinuance.]* Deft. may show, that the right of entry has been taken away by a discontinuance; as, where a tenant in tail makes a larger estate of the land than by law he is entitled to do, as if he makes a feoffment in fee simple, or for the life of the feoffor, or in tail; in which cases, if the feoffee retain possession of the premises after the death of the feoffor, it is a discontinuance, and neither the heir in tail, nor they in remainder or reversion, expectant on the determination of the estate tail, can enter on and possess the premises: 3 *Bl. Com.* 171; *Co. Lit.* 323, *a.* It must appear, however, that the party causing the discontinuance was once seized of the freehold and inheritance of the estate in tail: 1 *Inst.* 347; *Lit. S.* 640, 658. The instrument by which the estate of the party is alienated or discontinued must be proved, as, if it be by confirmation with warranty, by feoffment, by fine, by common recovery, or by release: *Co. Lit.* 325, *a.*; *Adams, Eject.* 36. Conveyances by feoffment and livery, or by fine or recovery, by tenant in tail in possession, work a discontinuance; but, if by covenants to stand seized to uses under the statute, lease and release, bargain and sale, they do not, *Co. Lit.* 330, *a. n.* 1, unless accompanied with a fine, as one and the same assurance in the two latter instances, 10 *Co.* 95; but, if a *distinct* assurance, it is otherwise: 2 *Burr.* 704. If, however, in these conveyances, a warranty be added, they may work a discontinuance: *Co. Lit.* 430, *a. n.* By statute 32 *H. 8, c.* 28, no act by the husband alone shall work a discontinuance or prejudice the inheritance or freehold of the wife; but, after his death, she or her heirs may enter on the lands in question. Alienations made by a sole corporation, as a bishop or dean, without the consent of the chapter, since the 1 *E. c.* 19, and 13 *E. c.* 10, cannot work a discontinuance: 3 *Bl. Com.* 172.

*Right of Entry barred by Descent Cast.]* The deft. may prove that the entry of the lessor of the plt. is barred by a descent cast. Descents which take away entries are, when any one seized by any means whatever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir; in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away, 3 *Bl. Com.* 176; see the doctrine as to descents cast, in *Adams, Eject.* 41 to 46; *Burr.* 60. According to *Adams*, 41, *n. E.*, it is scarcely possible to suggest a case in which the doctrine of descent cast can be now so applied as to prevent a claimant from maintaining ejectment, as, from the principles of disseisin at election, he may always lay his demise in the time of the ancestor, and not elect to be disseised. Where the entry of the party, or his ancestor, was originally lawful, and like continuance in possession only not lawful, the entry is not taken away: 2 *D. & R.* 41. If a disseisor make a lease for term of his own life, and die, this descent shall not take away the entry of the disseisee, if the disseisor should die seized of the free

and frank tenement: *Co. Lit.* 239, *b*. If a *feme covert* is disseisee, and, after her husband dies, she takes a second husband, and then the descent happens, this descent shall take away the entry of the *feme*, for she might have entered before the second marriage, and prevented the descent: 1 *Salk.* 241; 4 *T. R.* 300. There are also many cases in which a descent cast will not toll an entry, as in case of incorporeal hereditaments: *Co. Lit.* 237, *a*. So, where the ancestor and heir are not seized of the same estate: *ib.* 238, *b*. Escheat and succession have not the effect of a descent: *ib.* 239, *b*. 250, *a*. The entry is not tolled where the descent is not immediately, \*as [\*476] where a tenancy by a courtesy intervenes: *Co. Lit.* s. 394. So, where the descent has been avoided, as by the seizin of a dowress: *ib.* s. 393. Nor is it tolled in the case of a devisee, *Co. Lit.* 240, *b*; nor in case of a condition broken, *ib.* 339, *b*; nor is the entry of tenant for years, *Co. Lit.* s. 411; or other person having a chattel interest, *Co. Lit.* 249, *a*., tolled by a descent cast. The right of entry is not tolled by a descent cast, if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: *Co. Lit.* 246. And this title of taking away entries by descent is still further narrowed by 32 *H.* 8, *c.* 33, which enacts, that, if any person disseizes, or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has a right to the land, unless the disseisor had peaceable possession five years next after the disseisin. This statute does not extend to any feoffee or endorsee of the disseisor, mediate or immediate: 3 *Bl. Com.* 177.

*Right of Entry barred by Statute of Limitations.*] By 21 *Jac.* 1, *c.* 16, *s.* 1, it is enacted, "that no person shall make any entry upon any lands, &c., but within twenty years next after his right or title shall first descend or accrue; and, in default thereof, such person so not entering, and his heir, shall be utterly disabled from such entry." The king is not bound by this statute, nor are ecclesiastical persons, *Adams*, 46; but the statute, with these exceptions, applies to all persons having a right to enter, and therefore, if deft. can show that he, or those under whom he claims, has been in possession for the last twenty years, *adversely*, to the title of the claimant, and it appears that the claimant has not been prevented from prosecuting his claim earlier by reason of some of the disabilities allowed by the 2d section (*post*), he will be barred of his remedy by ejectment: *Adams*, 46. With respect to what will constitute an adverse holding of this nature, it is laid down in *Adams*, *Eject.* 47, that an adverse possession will be negatived, when the parties claim under the same title, if the possession of one party is consistent with the title of the other, when the party claiming title has never, in contemplation of law, been out of possession, and when the possessor has acknowledged a title in the claimant. Where a cottage is built on the lord's waste, though in defiance of him, and the possession of it remains undisturbed for twenty years, the lord cannot recover: *Doe d. Jackson v. Wilkinson*; 3 *B. & C.* 413. Whether adverse possession of an encroachment upon the waste of the lord adjoining to premises demised to the party encroaching, for twenty years, shall be a bar to ejectment by him, seems

to be undecided, because it may have been done for the benefit of the lord after the determination of the term demised: see *Doe d. Calcrough v. Mulliner*, 1 *Esp. Rep.* 461; *Creach v. Wilmot*, 2 *Taunt.* 160; *Doe d. Challnor v. Davies*, 1 *Esp. Rep.* 461; *Bryan d. Child v. Winwood*, 1 *Taunt.* 208; *Attorney-General v. Fullerton*, 1 *V. & B.* 263. The Statute of Limitations will be no defence where the relation of landlord and tenant subsists, the possession under such terms never being considered adverse, *Roe d. Pellatt v. Ferrars*, 2 *B. & P.* 542; nor even if the tenant be one by sufferance, *Doe d. Souter v. Hull*, 2 *D. & R.* 38; nor will the possession be adverse, as between trustee and *cestui-que trust*, *Keene d. Byron v. Deardon*, 8 *East*, 248; and, though the adverse possession of a cottage for twenty years, built in defiance of the lord, will be a good bar, yet, if there be any acknowledgment of a tenancy having subsisted, the possession will not be considered adverse; as, where, after a period of thirty years, 6d. rent was paid, it was held to be evidence that the occupation began by permission: *Doe d. Jackson v. Wilkinson*, 3 *B. & C.* 413; 5 *D. & R.* 273; 2 *B. & P.* 542. Where interest has been paid, the possession of the mortgagor for twenty years will not be considered adverse to that part of the mortgagee:

[\*477] *Hatcher v. Fineaux*, 1 *Ld. Raym.* 741. Where \*premises were mortgaged in fee, with a proviso for reconveyance, if the principal were not paid on a given day, and in the meantime that the mortgagor should continue in possession, upon special verdict, it was found, that the principal was not paid on the given day, but that the mortgagor continued in possession, and there was no finding by the jury, either that interest had or had not been paid by the mortgagor, it was held, that upon this finding it must be taken, that the occupation was, by the permission of the mortgagee, and consequently, that, although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the Statute of Limitations: *B. N. P.* 104; *Hall v. Doe d. Surtees*, 5 *B. & A.* 687. The possession will not be adverse, where the possession of one party is not inconsistent with that of the other, as in the case of joint-tenants, parceners, or tenants in common, where the possession of one is, in contemplation of law, the possession of the other, *Ford v. Gray*, *Salk.* 285, 6 *Mod.* 44, *s. c.*, *Smales v. Dales*, *Hob.* 120, *Doe d. Barnet v. Keene*, 7 *T. R.* 386; or, where a younger son enters by abatement on the death of his father, and dies seized, this possession is not adverse to the title of his elder brother: *Co. Lit.* 243, *a.* The possession of a particular tenant is not adverse to him in remainder or reversion: *Taylor d. Alkyns v. Horde*, 1 *Burr.* 60; *Fisher v. Prosser*, *Cowp.* 218; *Doe d. Milner v. Brightwin*, 10 *East*, 583.

The second section of the above act provides, nevertheless, "that, if any person, having a right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person and his heir may, notwithstanding the twenty years be expired, bring his action, or make his entry, as he might have done before this act, so as such person, or his heir, shall, within ten years next after his and their full age, discovery, coming of sound

mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no period after the said ten years." Where a party would take advantage of this second section, it must appear that his disability to enter existed when his title accrued, for no subsequent disability will prevent the statute from running, *Cotterell v. Dutton*, 4 Taunt. 826, *Doe d. Dunroure v. Jones*, 4 T. R. 300; whether such disability be voluntary or otherwise, yet it makes no difference: *ib.* "If a man, both of nonsane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his nonsane memory continuing, his privilege as to being out of the kingdom is gone, and that of nonsane memory will begin from the time he returns to his senses:" *Sturt v. Mellish*, 2 Atk. 610, 614. Where an ancestor died seized, leaving a son and daughter infants, and, on the death of the ancestor, a stranger entered, and the son soon after went to sea, and was supposed to have died abroad, within age, it was held that "the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years, more than twenty years having elapsed since the death of the person last seized, *Doe d. George v. Jesson*, 6 East, 40; the word 'death' in the statute meaning and referring to the death of the person to whom the right first accrued;" *p. Ld. Ellenb.*: *ib.* 84. But, *p. Mansfield, C. J.*, "the daughter and infant heir of a *feme covert* has ten years after the disability ceases, not from the death of her mother:" *Cotterell v. Dutton*, 4 Taunt. 830. In the case of parceners, if one be under a disability within the meaning of the act, and the other be under no disability, but neglect to enter within the limited time, the disability of the one will be no preservation of the right of the other: *Roe d. Langdon v. Rowlston*, 2 Taunt. 445.

#### *Competency of Witnesses.*

The party in possession is not a competent witness to support the title of the landlord, *Doe d. Forster v. Williams*, Cowp. 621, *Bourne v. Turner*, Str. \*632, *Doe v. Pye*, 1 Esp. Rep. 364; [\*478] nor will he be competent to prove the possession of the premises to be in him, and not in the deft.: *Doe d. Jones v. Wilde*, 5 Taunt. 183; *Doe d. Lewis v. Bingham*, 4 B. & A. 672. The evidence of an heir apparent is admissible, because his interest depends upon a contingency; but the evidence of a remainder-man or reversioner, or of a remainder-man in tail, will be rejected, as he has a present estate in the land: *Smith v. Blacham*, Salk. 283. But where a lessee has become bankrupt, and obtained his certificate, he is considered no longer interested, and his evidence will be admissible: *Longchamp v. Fawcitt*, Pea. Rep. 71. A party who has mortgaged the lands is not a competent witness concerning them, as he is still entitled to the equity of redemption: *Anon.* 11 Mod. 354. On a question as to whether C. demised the premises, without reserving rent, to B., or another person, the evidence of C. will be admitted to prove the point in issue, as it was a matter of indifference to him which individual became his tenant, *Bell v. Harwood*, 3 T. R. 308; but, if two individuals who are contending for the possession, are to pay rent in different rights, there the landlord cannot be admitted a witness in the ejectment: *ib. Fox v. Swan*, Sty. 482;



*Smith v. Chamber*; 4 *Esp. Rep.* 164. A co-defendant is not a competent witness for his fellow: *Doe d. Harrop v. Green*, 4 *Esp. Rep.* 198. Where a witness for the plt. in evidence said, that the lessor had assigned to him the premises for a temporary purpose, but that he had given up the deed to the lessor again, and had never had any possession of the premises, it was held he was incompetent, by reason of interest, "as the recovery of the plt. would perfect that title which he has conveyed to the witness, and which, in an ejectment brought against him, this plt. would be estopped from denying:" *p. Best, C. J., Doe d. Scales v. Bragg, R. & M.* 87. In ejectment by a devisee, the question turned upon the sanity of the testator at the time of making the will: held that the executor who took a pecuniary interest under it, was a competent witness to support it, *Doe d. Wood v. Teage*, 5 *B. & C.* 335, 8 *D. & R.* 63, *s. c.*, as it only established the will as to the real property, and, in any other proceeding to establish the will as to the personalty, the suit would be treated as *res inter alios acta*: *p. cur. ib.* A wife will not be permitted to prove the non-access of her husband, in a question of illegitimacy; but she is competent to prove the fact of her connexion with the person whom she charges as being the real father of the child: 8 *East*, 203.



## ELEGIT.

See "EJECTMENT," *ante*, 463.



## ENROLMENT.

See "DEED," "CHANCERY," "BANKRUPT," "FINE."



## ENTRY.

See "EJECTMENT," *ante*, 455.



## \*EQUITY.

See "CHANCERY," "EJECTMENT," 455.



## ESCAPE ON MESNE PROCESS.

FORM OF REMEDY, 479.

FORM OF PLEADINGS, *ib.*

PRECEDENTS, 480.

EVIDENCE FOR PLAINTIFF, 481.

EVIDENCE FOR DEFENDANT, 483.

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*Form of Remedy.*

THE only form of remedy by action against the sheriff, or other offi-

cer, for an escape on mesne process, is case: 1 *Saund.* 37-38, n. 2; 2 *Inst.* 382. It seems that case lies for an escape on an attachment for non-payment of money: *Lewis v. Morland*, 2 *B. & A.* 56. As to escape warrant, see 1 *Anne*, c. 6.

### *Form of Pleadings.*

DECLARATION.] The venue is transitory: *Griffith v. Walker*, 1 *Wils.* 336. It is necessary to allege that the plt. had a cause of action against the deft. in the original action, or deft. may demur, 2 *Lev.* 85, 4 *T. R.* 611, 2 *Saund.* 150; and, in laying a time to such fact, in order to avoid an unnecessary statement of different days, it is advisable to insert the teste of the writ, or the day it issued; and the former is preferable. The subject-matter of the debt, and a promise to pay it, have been usually stated, but this seems to be unnecessary; and it suffices to allege generally that the plt. had a cause of action, without minutely stating it, as in an action against deft. himself: *Com. D. Pleader*, 2 *P.* 1, & *E.* 18; 8 *T. R.* 127. It is not necessary to state the precise sum due: 2 *Lev.* 85. If the nature of the debt be stated, it must be proved as stated; as, if the declaration state the debt to be for goods sold, it must be so proved, 2 *Esp. N. P. C.* 476; and if, in that case, it should appear they were sold on credit, it would be a variance, 5 *Esp. Rep.* 102; see *Pea. Rep.* 117. Where it is expected that the sheriff will suffer judgment by default, it is often advisable to state the nature of the debt more fully, as some evidence may thereby be avoided: 2 *Chit. Pl.* 738, n. c. When the party proceeds in an inferior court, it should be stated that the debt accrued within the jurisdiction, though the omission will be aided after verdict: *Bentley v. Donnelly*, 8 *T. R.* 127; 2 *Saund.* 109, n. 2. The issuing and delivery of the process against the original deft. is next stated. This must agree with the facts; a material variance would be fatal. The observation and cases collected, *ante*, 188-9, as to the statement of the writ in an action on a bail-bond, will be here applicable. In addition to those cases, it has been held, that, where a latitat in trespass with an *ac-etiam* was stated to be a latitat in a plea of trespass, the variance was held fatal: *Gunter v. Cleyton*, 2 *Lev.* 85; *B. N. P.* 66. On the other hand, where it was stated that the plts. sued out an attachment of privilege, "by which said writ our said lord the king commanded the defts., &c., to attach A. B., &c., to answer the said plts. in a plea of trespass on the case, to the damage of the said plts. of £30, &c." and the writ produced did not contain the words, "to the damage, &c." it was held no variance: *Cousins v. Brown, M. & M.*, *C. N. P.* 291. As to the statement of the endorsement for bail, see *ante*, 189. The allegation that the debt was sworn to is unnecessary, and should be omitted, as it requires proof as stated: *Wilcoxon v. Nightingale*, *MSS.* [\*480] *C. P.*, *Hilary Term*, 1828, so held on demurrer; and see 1 *Burr.* 330; 1 *B. & P.* 281; 2 *Moo.* 60. As to the statement of the delivery of the writ to the sheriff, &c., see *ante*, 189.

In an action against the sheriff, it is usual to insert three counts in the declaration: 1st., for an escape; 2dly., for not arresting the deft. when there was an opportunity; and, 3dly, for not assigning the bail-bond on request, when, indeed, it is supposed there has been such bond. In the

count for an escape, it must be alleged that the original deft. was arrested, and that the sheriff, against the plt.'s license, permitted the escape. An averment in this respect that the sheriff *voluntarily* permitted the escape will be supported in evidence by proof of a negligent escape, and so *vice versa*: 1 *Vent.* 217; 3 *Keb.* 55, s. c. 2 *T. R.* 126. It suffices to state that the sheriff had not the body of deft. in court at the return of the writ, without further stating the default in appearance: *Cro. El.* 289; 2 *B. & P.* 561. In an action against a sheriff for not arresting the deft. when he had an opportunity, it should be alleged that the deft. was within the sheriff's bailiwick, and might have been arrested if the sheriff had chosen so to do, and yet the sheriff would not arrest. It is not necessary in such action to aver that the sheriff had notice of the deft.'s being in the bailiwick: 5 *D. & R.* 95.

**PLEA.]** The plea of the general issue will, in this action, in general suffice, as in other actions on the case: *ante*, 344-5.

### *Precedents.*

#### FOR AN ESCAPE ON MESNE PROCESS.

For that whereas, heretofore, to wit, on, &c. (*teste of writ, or day it issued*), at, &c. (*venue*), one E. F. was indebted to the said plt. in a large sum of money, to wit, the sum of £—, of lawful, &c., for and in respect of divers causes of action before then accrued to the said plt. against the said E. F.; and, being so indebted thereupon, he, the said plt., for the recovery of the said debt, afterwards, to wit, on the day and year aforesaid, sued and prosecuted out of the court of our said lord the king, &c. (*State the issuing of the writ, the endorsement for bail, the delivery to the sheriff, and the arrest, and which may be done in the same way as ante*, 188, in a declaration on a bail bond *after which proceed as follows*;) Yet the said deft. so being sheriff of the said county of —, as aforesaid, not regarding the duty of his office as such sheriff, but contriving and intending wrongfully and unjustly to injure the said plt., and to delay and hinder him in and from the recovery of his said debt, afterwards, and before the payment of the same, or any part thereof, to wit, on the day and year last aforesaid, at, &c. (*venue*), aforesaid, without the leave or license, and against the will, of the said plt., suffered and permitted the said E. F., to escape and go at large wheresoever he would, out of the custody of the said deft., so being such sheriff, as aforesaid. And the said plt. in fact, saith, that the said deft. had not the said E. F. in the said court of our said lord the king, before the king himself (*or, "of the Bench,"*), at the return of the said writ (*or, "precept"*), according to the exigency thereof, but therein wholly failed and made default, nor did the said E. F. then appear there; whereby the said plt. hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby, also, he, the said plt., hath lost and been deprived of the means of recovering his costs and charges by him incurred, paid, laid out, and expended in and about his said suit, so commenced and prosecuted against the said E. F., as aforesaid, amounting together to a large sum of money, to wit, the sum of £—, to wit, at, &c., aforesaid.

#### COUNT FOR NOT ARRESTING DEFT. WHEN THERE WAS OPPORTUNITY.

(*Proceed as pointed out in the preceding precedent to the end of the statement of delivery of writ to sheriff, and then as follows*;) And the said plt. in fact saith, that the said E. F., at the time of the delivery of the said last-mentioned writ (*or, "precept"*) to the said deft., so being sheriff of "the said county of —, as aforesaid, and from thence, until the return of the said last-mentioned writ (*or, "precept"*) was within the said sheriff's bailiwick, and the said sheriff, at any time during that period, might have taken and arrested the said E. F., by virtue of the said last-mentioned writ (*or, "precept"*), at the suit of the said plt., if he would so have done; yet the said deft., so being sheriff of the county of —, as aforesaid, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly to injure the said plt., and to delay and hinder him in and from the recovery of his debt last aforesaid, did not, nor would (at any time before the return of the said last-mentioned writ [*or, "precept"*]), (although often requested so to do), take, or cause to be taken, the said E. F., as, by the said last-mentioned writ (*or, "precept"*), he was commanded, but therein wholly failed and made default, and the said E. F. did not appear, &c. (*Same as in the preceding precedent to the end.*)

## FOR NOT ASSIGNING A BAIL-BOND.

(Proceed as in the count, *ante*, 480, to the end of the statement of the arrest, and then as follows:) And the said plt., in fact, further saith, that the said E. F., being so arrested and in custody of the said deft., so being such sheriff, as aforesaid, under and by virtue of the said writ, for the cause aforesaid, he, the said deft., as such sheriff, afterwards, and before the return of the said last-mentioned writ, to wit, on the day and year last aforesaid, at, &c. (*venue*), aforesaid, took bail for the appearance of the said E. F. in the said court, at the return of the said writ, according to the form of the statute in such case made and provided; and he, the said deft., on that occasion, then and there, to wit, on the day and year last aforesaid, at, &c. (*venue*), aforesaid, took of the said E. F., and two other persons, as his sureties or bail, according to the form of the said statute; a certain bail-bond, in the penal sum of £—, of lawful money of Great Britain, conditioned for the appearance of the said E. F., at the time and place aforesaid, to answer to the said plt. in the plea and bill aforesaid. And although the said plt. did afterwards, and whilst the said deft. was such sheriff, as aforesaid, to wit, on, &c. (*day of request, or about it*), at, &c., aforesaid, request the said deft. to assign the said bail-bond to him, the said plt., according to the form of the statute in such case made and provided, and although the said plt. was then and there ready and willing, and then and there offered, to pay to the said deft. the costs payable to him, the said deft., in that behalf, according to the form of the said last-mentioned statute, yet the said deft., so being such sheriff, as aforesaid, not regarding the duty of his said office as such sheriff, nor the statute in such case made and provided, but contriving and wrongfully and unjustly intending to injure the said plt. in this behalf, and to hinder and prevent him from bringing any action or actions on the said writing obligatory, and to deprive him of the means of recovering the damages aforesaid, did not nor would, at the said time when he was so requested, as aforesaid, assign the said bail-bond to him, the said plt., but, on the contrary thereof, then and there wholly refused, and hath from thence hitherto wholly neglected and refused, so to do, and, by means of the premises last aforesaid, he, the said plt., hath been and is hindered and prevented from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of recovering the said damages, and is likely to lose the same, to wit, at, &c., aforesaid.

*Evidence for Plaintiff.*

[*In Action for Escape.*] In an action against a sheriff for an escape on mesne process, the cause of action in the original suit, the issuing and delivery of the writ to the deft., and the arrest and escape, must be proved.

There must be a debt due to the plt. by the party arrested at the time of the arrest, *Alexander v. Macauley*, 4 T. R. 611; *White v. Jones*, 5 Esp. Rep. 160; and the same cause of action must be proved as the plt. has stated "in his declaration, *Parker v. Fenn*, [\*482] 2 Esp. Rep. 476; though it need not be proved to have been for the specific sum mentioned in the pleadings: *Gunter v. Cleyton*, 2 Lev. 85; *B. N. P.* 66. Any evidence which would be admissible against the deft. in the original action will be evidence against the sheriff: 2 Camp. 188. An acknowledgment by the party after his arrest, but previous to his escape, will be evidence of the debt against the sheriff: *Sloman v. Herne*, 2 Esp. Rep. 695; *Rogers v. Jones*, 7 B. & C. 86; 5 D. & R. 484; *Williams v. Bridges*, 2 Stark. 42. See *ante*, 479, as to variance in statement.

The process must be proved as alleged in the pleadings: as to what is a variance, *ante*, 479. Where it was alleged that the party was arrested "under a writ endorsed for bail, by virtue of an affidavit now on record," but no proof of the affidavit was produced at the trial, the Court of C. P. held, that the plt. had been properly nonsuited: *Webb v. Sheriff of Middlesex*, 1 B. & P. 281; 2 Esp. Rep. 671. But, where it was alleged that the writ was marked for bail "by virtue of an affidavit of the cause of action of the plt. in that behalf, before then made, and

duly filed of record in this court, according to the form of the statute," it was held, a copy of the affidavit was sufficient to prove the averment: *Casburn v. Reid*, 2 Moo. 60. When it was alleged, in a declaration against the marshal, that the party was arrested and gave bail, that afterwards bail above was put in before a judge at chambers, "as appears by the record of the recognizance," that the party surrendered in discharge of bail, and afterwards escaped, this averment was held not to be proved by the production of the filazer's book, the entry therein importing that the recognizance was taken before a single judge, an examined copy of the entry of the recognizance of bail, stating that it was taken before the Court at Westminster, having also been given in evidence: *Bevan v. Jones*, 4 B. & C. 403; *Wigley v. Jones*, 5 East, 440. Where the process has been returned and filed, an examined copy of the writ and return will be evidence of the issuing and delivery: *B. N. P.* 66; *Blatch v. Archer*, *Cowp.* 63; *Jones v. Wood*, 3 Camp. 229, 397; 1 *Esp. Rep.* 269. Where the writ has not been returned, secondary evidence will not be admissible, after due search at the Treasury Office, and proof of its having been delivered to the sheriff or under-sheriff, or at the sheriff's office, and notice given to produce the original: 2 *Phil. Ev.* 222.

The escape must be proved, by showing directly that the party was in the custody of the sheriff or his officer, or else that the sheriff returned *cepi corpus*, and that party was at large after the return of the writ, *Atkinson v. Matteson*, 2 T. R. 172, *Hawkins v. Plomer*, 2 W. Bl. 1048; or that the bail has not been put in and perfected; or that it has been put in, but of a term subsequent to the return of the writ: *Moses v. Norris*, 4 M. & S. 397.

The sheriff must be connected with the officer who suffered the debtor to escape, or who refused to arrest him, by proving the issuing of a warrant from the sheriff's office to arrest the deft.: see *post*, "Sheriff."

In an action for not *arresting debtor*, the original debt, the writ, and delivery of it to the sheriff, must be proved, as *supra*. The opportunity for the arrest must be fully shown, as also that the deft., or under-sheriff, or bailiff, who has the execution of the writ, knew of the debtor's being within the bailiwick: 2 *Phil. Ev.* 222. It is the officer's duty to search and make the arrest. The usual proof, in such action, is, that the bailiff was informed where the debtor was. Notice to the under-sheriff's agent in town, will not be sufficient notice to the sheriff: *Gibbon v. Coggon*, 2 Camp. 189.

In an action for not *assigning the bail-bond*, the original debt, and issuing and delivery of the writ, must be proved, as *supra*. The arrest, and giving the bail-bond, must also be proved, together [483] with the demand and refusal to assign the bond. Notice to produce the bail-bond should be given, and the service of such notice proved.

*Damages.*] The plt. is entitled only to such damages as a jury think fit to give him. Any special damage sustained by the escape should be proved. If the plt. prove his case, he will, at all events, be entitled to nominal damages: 2 *Bing.* 317.

*ADMISSIONS OF UNDER-SHERIFF.*] An acknowledgment of an escape by an under-sheriff, will be evidence in an action against the sheriff,

*Yatsley v. Doble*, 1 *Ld. Raym.* 190; but, on proof that inquiry had been made at the sheriff's office for the bail-bond, and the clerk had answered that there was no bail-bond, *Ld. Ellenb.* held it insufficient evidence to support the action against the sheriff: *Mendez v. Bridges*, 5 *Taunt.* 325. The bailiff's general conversation with any indifferent person is not evidence against the sheriff; but, where a thing is carried on by one *quasi* principal, what he says, in the course of the transaction, has been held, on great consideration, to be evidence against those he represents: *per Ld. Ellenb. North v. Miles*, 1 *Camp.* 390. So, the mere admission of a sheriff's bond bailiff is not evidence, until he be identified with the sheriff, and the privity existing between him and the sheriff be established in the particular transaction: *Drake v. Sykes*, 7 *T. R.* 113; *North v. Miles*, 1 *Camp.* 389. Declarations made by a bailiff, while the debtor is in custody, are admissible against the sheriff for an escape: *Bowsher v. Calley*, 1 *Camp.* 391, *n.*; *ante*, "*Admissions*."

#### *Evidence for Defendant.*

In an action against the sheriff for an escape on mesne process, he may show that, although no bail-bond was in fact taken, yet that bail was put in and perfected, or that the party rendered himself before the time for bringing in the body had expired: *Pariente v. Plumtree*, 2 *B. & P.* 35. The sheriff may also prove, in defence, that the deft. in the original action was rescued, *May v. Proby*, *Cro. J.* 419; or that he rescued himself by force: *Fernor v. Phillips*, *Holt*, 527. The fact of the rescue having been effected, must be proved; the mere return by the sheriff, of a rescue, is not conclusive: *Adey v. Bridges*, 2 *Stark.* 189. If the rescue have taken place after the party has been within the walls of a prison, it will not be an available defence, except it be by the king's enemies: *B. N. P.* 68; *Alsept v. Eyles*, 2 *H. Bl.* 113. If the party escape by the prison taking fire, it will be a good defence: 1 *Roll. Ab.* 808, *D. Pl.* 6. The sheriff may show that the party was arrested by the bailiff of a liberty on a mandate from the sheriff, in which case the bailiff alone is liable: *B. N. P.* 69; *Noy*, 27; 3 *Wils.* 309. But it will be no defence to show, that plt. was cognizant of the escape, and yet proceeded to judgment, but had not charged the debtor, who returned to gaol in execution: *Ravenscroft v. Eyles*, *B. N. P.* 69. In an action against the sheriff for an escape in not taking a bail-bond, he may show that good bail was put in and justified, in the room of bail before put in, who, by the practice of the court, were a mere nullity: *Allingham v. Flower*, 2 *B. & P.* 246. The sheriff will not be liable if a bail-bond have been given for deft.'s appearance at the return of the writ, though deft. do not appear, as it is peremptory on him to take bail, *Posterne v. Hanson*, 2 *Saund.* 61, *Ellis v. Yarborough*, 1 *Mod.* 227, *Barton v. Aldeworth*, *Cro. El.* 624; but it will be otherwise if he have not taken a bail-bond, or bail be not put in and perfected in due time, *Fuller v. Prest*, 7 *T. R.* 109, *Webb v. Mathews*, 1 *B. & P.* 225, *Atkinson v. Mattison*, 2 *T. R.* 176; and it will be no defence, if the sheriff have taken a bail-bond, if the deft. do not appear at the return of the writ, and the sheriff refuse

to assign the bond, *Stamper v. Milbourne*, 7 T. R. 122, *Mendez v. Bridges*, 5 Taunt, 325; nor that the "sheriff's officer refused to arrest the deft. in the original action, if notice was given him that the party was in his county: *Watson, Shff.* 128. But where the sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and, at the time of contracting the debt, had represented himself as G. B., it was held, that the sheriff, having been informed of these circumstances, while the real debtor was in his custody, was not bound to detain him; and, therefore, no action could be maintained against the sheriff for an escape: *Moogans v. Bridges*, 1 B. & A. 647.

*Recaption.*] The sheriff may show that, though the party had been at large, yet he was retaken previous to the return of the writ, *Atkinson v. Matteson*, 2 T. R. 172; and, where the party escapes without the privity of the sheriff, he may be retaken before or after the return of the writ: *Com. D. Escape, E.* There cannot be a recaption for the fees due to the sheriff after the party has been discharged out of custody, by consent of the plt.: *Willing v. Gord*, *Str.* 909; and where the sheriff had put in bail above, and discharged the deft. without a bail-bond, they may surrender him: *R. v. Butcher*, *Pea. Rep.* 226; *Evans v. Swete*, 2 Bing. 271; *Berchere v. Colson*, *Str.* 876.



## ESCAPE ON FINAL PROCESS.

FORM OF REMEDY FOR, 484.

FORM OF PLEADINGS, 485.

EVIDENCE FOR PLAINTIFF, 487.

EVIDENCE FOR DEFENDANT, 489.

### *Form of Remedy.*

The form of remedy by action, for an escape on final process, is debt or case: *Cro. J.*, 289. At common law, no action of debt lies against a gaoler for an escape out of execution, but only an action on the case, 2 *Inst.* 382; in which case the creditor might recover damages for the officer's misconduct. But the stat. of *West. 2 & 1 R. 2, c. 12*, gave an action of debt against the warden of the Fleet, sheriff, or gaoler, to recover at once the sum for which the prisoner was charged in custody: see 2 T. R. 132. Debt lies by the statutes, as well where the escape is negligent as where it is voluntary, 2 *Str.* 827, 2 *H. Bl.* 108; but it lies not against a sheriff for omitting to arrest a party on a *ca. sa.* when he had an opportunity; and, in that case, plt. should declare in case: 2 *W. Bl. R.* 1048; 2 *W. Bl. R.* 113. Debt is the most preferable form of remedy, when maintainable, as the plt. is entitled to recover the whole debt and the sheriff's poundage: *Bonafous v. Walker*, 2 T. R. 129; *Alsept v. Eyles*, 2 *H. Bl.* 113; 2 *W. Bl. R.* 1048. Whereas, in an action upon the case, he will recover such damages only as the jury are inclined to give, *Bonafous v. Walker*, 2 T. R. 130; and, moreover in the action of debt, the Statute of Limitations is no defence: *Jones v. Pope*, 1 *Sid.* 306.

The sheriff's remedy against the party escaping, where he has sustained damage, is by action on the case against him for such damage: *Watson on Sheffs.*, 142. As to when the sheriff may retake the debt, see *ib.*, 141.

By 1 *Anne*, st. 2, c. 6, s. 2, a remedy is given against sheriffs who permit the escape of persons who have been retaken on an *escape-warrant* authorized by that act.

With respect to the party by whom this action may be brought, the \*proper person is the plt. or plts. in the original [\*485] action. The nominal plt., in an action for mesne profits, may sue for an escape on a judgment therein: 2 *M. & S.* 473. An executor may maintain the action for an escape in his testator's lifetime: *Ld. Raym.* 973; 6 *Mod.* 125, s. c. On an escape on a judgment obtained by plt. as an administrator, he may sue in his own personal right: 2 *T. R.* 126. The hundred may sue for an escape in a judgment obtained by them: *Fitzg.* 296. If, while the debt. be in custody of the sheriff, in an action at the suit of A., a writ be lodged in the office of the sheriff, at the suit of B., and the debt. escape, B., as well as A., may sue for the escape: *Barton v. Sutton*, 1 *B. & P.* 24; *Salk.* 273.

The action should be brought against the superior, and not the inferior, officer or gaoler who permitted the escape: see cases in *Watson, Shff.*, 144, 5. The 59 *Geo.* 3, c. 64, renders the warden of the Fleet liable for an escape in vacation. Where there are two sheriffs, who suffer an escape, and one dies, the action lies against the survivor; or, if, pending the action, one dies, the action survives: *Cro. Eliz.* 625. If the old sheriff, at the expiration of his office, omit to turn over a prisoner, by assignment, to the new sheriff, he is liable for an escape: 3 *Rep.* 71, b., and see, further, *Watson*, 145. By 3 *G.* 1, c. 15, s. 8, in case of the death of the sheriff, the under-sheriff is liable for escape after that time. Neither the heir nor executor of the sheriff are liable: *Dyer*, 271, 322, a.; 1 *Ld. Raym.* 399.

### *Form of Pleadings.*

*Declaration.*] It must be shown the escape was on final process; and, for this, it is necessary there be an allegation that a judgment was recovered. The mere averment of *quod cum recuperasset* has been held sufficient, without a *prout patet per recordum*, as the gist of the action is the escape, and the commitment only inducement: *Waites v. Briggs*, 2 *Salk.* 565; 1 *Ld. Raym.* 35, s. c.; *Eden v. Lloyd*, *Cro. Eliz.* 877. The judgment should be stated accurately, but it suffices if the judgment be substantially proved as stated. Where the plt. alleged that the judgment was recovered as of Trinity Term, "as appears from the record," and the proof was of judgment in Easter Term, it was, nevertheless, held good, as the words "as appears by the record," might be rejected as surplusage: *Stoddart v. Palmer*, 3 *B. & C.* 2; 4 *D. & R.* 624, s. c.; *Purcell v. Macnamara*, 9 *East*, 157; *Phillips v. Shaw*, 4 *B. & A.* 435; 5 *ib.* 964, s. c. So, where a declaration stated, "that the plt., in E. T. 5 G. 4, recovered in the K. B. against one H. W., as by the record appeared, that in T. T. in the same year such proceedings were had in the said court, that it was considered the plt. should



have execution against the said H. W. for the damages aforesaid, as by the record of the said last-mentioned proceeding still remaining in the said court appears, and therefore, on, &c., in T. T. in the same year, the said H. W. was committed to the custody of the marshal, in execution and escape," the original judgment was proved, and that a *committitur* issued thereon, but no judgment in *sci. fa.* was proved: it was held sufficient, the latter judgment being immaterial: *Bromfield v. Jones*, 4 B. & C. 380; 6 D. & R. 500, *s. c.* But, though an allegation of this nature be merely inducement; yet, in some cases, strict proof of it will be necessary, as where, in a declaration for an escape, it was alleged, "that one S. S. was arrested and gave bail, and that afterwards bail was put in before a judge at chambers, as appears by the record of the recognizance," it was held, *plt.* was bound to prove bail put in as alleged, and that such allegation was not established by production of the filazer's book, wherein it appeared that the recognizance was taken before a single judge, when there also was produced an examined copy of the entry of recognizance of bail, by which it appeared that the recognizance was taken before the court at Westminster: *Bevan v. Jones*, 4 B. [\*486] & C. 403; 6 D. & R. \*483, *s. c.* And so an allegation with a *prout patet*, &c., that the *plts.*, by the judgment of the court, recovered against the bail, is not proved by the production of the recognizance of bail and the *sci. fa.* roll, which latter concluded in the common form; as the proof was merely of an award or judgment of execution by the court, and not a judgment to recover: *Phillips v. Mangles*, 11 East, 516. Stating the judgment to be on certain "promises and undertakings," when it was only on a "promise and undertaking," would be a variance: *Semb. Edwards v. Lucas*, 5 B. & C. 339; 8 D. & R. 98. Stating a judgment in the K. B. to be recovered "in the Court of the Bench," would be bad: *Mill v. Pollon*, 1 Moo. 19; 7 Taunt. 271, *s. c.*

In an action against the sheriff, after stating the judgment, the writ, and delivery thereof to the deft., should be stated accurately. As to what a variance, see *ante*, 485. Correctly stating the writ in substance will suffice. The word "damage," when the writ is damages and costs, is not a variance: *Phillips v. Bacon*, 9 East, 298. The writ may be described as issued to the sheriff, naming him: *Batchellor v. Salmon*, 2 Camp. 525. Though it be stated that the deft. was sheriff, after the return of the writ, it is no variance, though the deft.'s shrievalty expired before the return: *Semb. 3 D. & R. 483.*

In an action against the marshal or warden, the mode in which the original deft. came into their custody, if stated, should be correctly so. If he was in custody under a *committitur*, the same should be stated to be of record: *Wightman v. Malleus*, 2 Str. 1226. According to the language of the entry of the *committitur*, a reference to the record of the *committitur* should be made, to avoid a special demurrer, though the omission of it would be cured by verdict: *Barnes v. Eyles*, 8 Taunt. 512; 2 Moo. 561, *s. c.*; *Turner v. Eyles*, 3 B. & P. 456; and see 3 D. & R. 597. Where a declaration alleged that the prisoner was, by *habeas corpus*, brought before a judge of K. B., by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*,

and the said commitment thereon, now remaining in the said court, more fully appears," such allegation was not proved by evidence of a commitment by a judge of K. B., but not filed of record: *Turner v. Eyles*, B. & P. 456; *Wigley v. Jones*, 5 East, 440. If a prisoner be removed by *habeas corpus* from the King's Bench to the Common Pleas, the plt. need not show a process in the Common Pleas against the prisoner: *Gambier v. Wright*, 2 Str. 950; *Com. D. Escape, C.*

A negligent escape may be given in evidence under a count for a voluntary escape: *Bonafoy v. Walker*, 2 T. R. 131; 1 Vent. 211.

*Plea.*] In an action of debt for an escape, the plt. may plead *nil debet*, by which plea the whole declaration will be put in issue, and the sheriff may, under it, set up any matter of excuse except recaption, or the voluntary return of the deft. to custody.

A retaking, or fresh pursuit, must be specially pleaded; according to 8 & 9 W. 3. c. 27, s. 6, "no retaking, or fresh pursuit, shall be given in evidence, on trial of any issue, in any action of escape against the marshal, &c., unless the same shall be specially pleaded; nor shall any special plea be received, or allowed, unless oath be first made in writing, by the deft., and filed in the proper office, that the prisoner, for whose escape such action is brought, did escape without his consent, privity, or knowledge:" 2 W. Bl. R. 1059; 1 Tidd, 703. A voluntary return of a prisoner after an escape, before action brought, is equal to a retaking, on fresh pursuit, and must be specially pleaded: *Bonafoy v. Walker*, 2 T. R. 136. And, in framing a plea of the recaption, or of the voluntary return of the deft. before action brought, it is necessary to allege that such recaption or return was before action brought; otherwise the plea will be defective on demurrer: *Stonehouse v. Mullins*, Str. 873. If the declaration allege that the escape \*was voluntary, recaption, on fresh pursuit, is a good plea, without traversing that the escape was voluntary, as plt. may show, in his replication, that the escape was voluntary, if he mean to rely on that fact: 1 Vent. 211, 7. In a plea of recaption, or of voluntary return of the deft. to custody before action brought, it is necessary for the sheriff to allege, that the deft. was detained in prison from the time of such recaption, or return, to the commencement of the action against the sheriff, or until the deft.'s legal discharge: *Chambers v. Jones*, 11 East, 406; *Meriton v. Briggs*, 1 Ld. Raym. 39; 1 B. & P. 413; *Willis v. Gambier*, Prac. Reg. 199.

#### Precedents.

See form of precedent in debt against sheriff for an escape under a *ca. sa.*, 2 Chit. Pl. 416; against marshal for an escape, where prisoner was committed in execution, *ib.*, 419; against warden, where prisoner was removed by *habeas corpus* to the Fleet, and the original was in K. B., *ib.*, 421; and the like where the original action was in C. P., and prisoner brought up before court, and recommitted, *ib.* 423. See various pleas and replications in debt, 3 Chit. Pl. 967 to 961—1170.

#### Evidence for Plaintiff.

*Judgment in Original Action.*] The plt. must prove the judgment whereon the *ca. sa.* issued; as to proof of which, see *post*, "Judgment." As to what a variance, *ante*, 485.

*Issuing and Delivery of Writ.*] In an action against the sheriff, this must be proved, and may be so by an examined copy of the writ, with the sheriff's return endorsed thereon, *B. N. P.* 66, 2 *Phil. Ev.* 231; *Stark. Ev.* 1346; though, where no return appears to have been made, and notice to produce the writ have been served, parol evidence of its contents will be admissible: *Watson's Sheriff*, 148; see *ante*, 486, as to variance.

*The Arrest.*] In an action against the sheriff, the arrest must be proved in the same manner as in escape on mesne process, *ante*, 482. If the sheriff has returned *cepi corpus*, it may be proved by an examined copy of the judgment, writ, and return; but, if no return has been made, the warrant to the bailiff, and the arrest by him, may be proved, *Stark. Ev.* 1346; and it must appear that the party arresting was empowered with authority so to do, *Blatch v. Archer, Coup.* 65. But the arrest will be good, though the party making it be not seen by the deft.; nor is any exact distance prescribed: *ib.* Where the party to be arrested is already in custody of the sheriff, at the suit of another creditor, the mere delivery of the writ to the sheriff is sufficient evidence of an arrest: *B. N. P.* 66; *Salk.* 274. By 8 & 9 *W. 3, c.* 26, s. 9, "if any person, desiring to charge another with any action or execution, shall desire to be informed by the marshal of the K. B., or warden of the C. P., or his deputy, or by any other keeper or keepers of any other prison, whether such person be a prisoner in his custody or not, every such marshal, warden, or keeper, shall give a true note in writing thereof, to the person requesting the same, or his attorney, on demand; and, if such person be an actual prisoner in custody of such keeper, such note shall be taken as evidence of the fact: *B. N. P.* 68. If the deft. plead no escape, the fact of the arrest will be admitted: *B. N. P.* 67. Where a prisoner is in custody of the marshal, and is to be charged with a King's Bench execution, a rule is obtained from the marshal to acknowledge the deft. to be in his custody, and such acknowledgment is evidence of the arrest; and so, if the prisoner is in custody of the warden of the Fleet, and [\*488] is charged with a Common Pleas or Exchequer writ, a *\*habeas corpus* is obtained, the return to which will be evidence of his being in custody: *Stark. Ev.* 1346; *Pea. Ev.* 422.

*The Escape.*] The escape may be proved by persons who have seen the prisoner at large after the arrest, even for however short a time, and either before or after the return of the writ: *Hawkins v. Plomer*, 2 *W. Bl.* 1049; *Balden v. Temple, Hob.* 202; *Platt v. Locke, Plowd.* 35. The being out of the custody of the party arresting will be an escape, as where the bailiff of a liberty, after an arrest, removes the prisoner to the county gaol, situate out of the liberty, and delivers him into the custody of the sheriff, *Boothman v. E. of Surrey*, 2 *T. R.* 5; or, if the prisoner, previous to his being taken to prison, be allowed to go about to settle his affairs, though in the custody of a bailiff's follower, it will be an escape, *Benton v. Sutton*, as the prisoner is no longer in the custody of the party by whom payment of the debt might be enforced: *ib.* But the prisoner will not be deemed to be out of the custody of the sheriff, if he carry him to a lock-up house within his own bailiwick, and keep him there fourteen days before the return of the writ; and it will be no escape, though it might be otherwise, "if there were particular indulgence or

favour shown to the deft., or if the place where he was kept were dangerous or insecure:" *per Mansfield, C. J., Houlditch v. Birch*, 4 *Taunt.* 610; *Hard.* 31. If the sheriff, before a return of a *ca. sa.*, liberate the prisoner upon his paying the money endorsed on the writ to the sheriff, it will be an escape, the writ directing the sheriff to take and keep the body of the prisoner, so that he may have it at the return of the writ, to satisfy the *plf.* of his *damages, costs, and charges.* *Slackford v. Austin*, 14 *East*, 468; recognized by *Abbott, C. J., Crozer v. Pelling*, 4 *B. & C.* 31. If an escape be voluntary, it must appear to be with the consent, or by the default of the marshal; but his allowing the rules of the prison is no default in him, because the law has given a sanction to it, *per Buller, J., Bonafous v. Walker*, 3 *T. R.* 131. Evidence, however, of a negligent escape will satisfy a court for a voluntary one: *ib.* Where a new sheriff is appointed, his predecessor ought to deliver over all the prisoners in his custody charged with their respective executions; and, if he omit any, it is an escape. But, if a sheriff die, the new one must, at his peril, take notice of all persons in custody, and of the several executions with which they are charged: *B. N. P.* 68. And so, where there are sheriffs *defts.*, and one die, the action will remain against the survivor, the tort being joint and several: *Bennison v. Sheriffs of York*, *Cro. E.* 625. By 8 & 9 *W.* 3, c. 27, s. 8, if the marshal or warden, or their deputies, or the keeper of any prison, after one day's notice in writing, given for the purpose, shall refuse to show a prisoner committed in execution to the creditor, or his attorney, such refusal shall be adjudged an escape: *B. N. P.* 68. If there be a judgment against two persons in execution, and one escape, the sheriff will be liable for the whole debt, *Roll. Ab. Escape, F.* 4; and so, where husband and wife are in custody, and the wife escape: *ib.* 5; *Whiting v. Reynell, Cro. J.*, 657; *Sukliffe v. Reynell*, 2 *Bulst.* 320. If there be an escape, an action may be maintained, though the judgment on which it was founded be erroneous, *Gold v. Strobe, Carth.* 148, 3 *Mod.* 324; but there will be no escape if the sheriff permit the prisoner to go out of his custody on the judgment being reversed: *Wats.* 139.

*Damages.*] The deft., in an action of debt for an escape, is liable for the whole debt and costs in the original action; the jury cannot give less: 1 *Saund.* 35, n. 1; 2 *T. R.* 129; 2 *Chit. Rep.* 454. The deft. has no means of re-imbursing himself if the escape were voluntary: *Watson*, 149.

*\*Evidence for Defendant.*

[\*489]

The sheriff may prove the escape to have been effected by the act of God, or the king's enemies: 4 *Co.* 84; *B. N. P.* 66. To support a special plea, deft. may show that the party escaped against his will, and that, after fresh pursuit, he was retaken before the commencement of the action, *Bonafous v. Walker*, 2 *T. R.* 126, 8 and 9 *W.* 3, c. 27; or that the party returned into custody previous to the action being commenced; though, in these cases, it must appear that he was in the custody of the sheriff when the action was commenced: *Stark. Ev.* 1349. The sheriff may show that the judgment was void, as being *coram non judice*: *B. N. P.* 65; *Carth.* 148.

## ESCROW.

UNDER the plea of *non est factum*, deft. may show that the deed was delivered as an escrow, upon a condition not yet performed: *B. N. P.* 172; *Stoytes v. Pearson*, 4 *Esp. Rep.* 255. As to the form of a plea of delivering of a bond as an escrow, it sometimes commences with the allegation, *actio non*; but, as the validity of the deed is disputed, *onerari non* appears more correct: *Rust. Ent.* 181 *b*, 182 *a*. It is said that, as this plea, in effect, denies the allegation that the deft. made his deed, the plea should conclude to the country: 1 *Salk.* 274; see precedent, 3 *Chit. Pl.* 962. When it was intended that the delivery should be conditional, and that the deed should not operate as an effective deed from the moment of delivery, but remain as an escrow, evidence must be given to show that such intention was clearly expressed at the time of execution, *Vin. Ab. Fait M. Co. Lit.* 36. It is not, however, essential that any express words should, to that effect, be used at the time; but it is a question for the jury, and they must draw their conclusion from all the circumstances: *Murray v. Earl of Stair*, 2 *B. & C.* 88; 3 *D. & R.* 273. Where, previous to the entering into a composition-deed, it was agreed with the surety, that, unless all the creditors signed, it should be void, the surety, however, afterwards executed the deed, and delivered it to one of the creditors to be executed by the rest, it was held, this was a delivery of the deed as an escrow, and that, all the creditors not having signed, the surety was not bound: *Johnson v. Baker*, 4 *B. & A.* 440.



## ESTOPPEL.

See "DEED," "ADMISSIONS."



## EVIDENCE.

*The Affirmative of the Issue must be proved*, 489.

*The Substance of the Issue need only be proved*, 491.

*The Evidence must be confined to the Issue*, 492.

*Course of Evidence*, 494.

*Demurrer, to*, 495.

As to "Hearsay Evidence," "Parol Evidence," "Evidence by Admissions," by "Public Documents," &c., see the respective titles throughout the work.

*The Affirmative of the Issue must be proved.*] When the issue is joined in a cause, the affirmative averments it contains must generally be proved by the party making them; and the plt. and deft. are [\*490] equally bound \*to prove such averments in their respective pleadings, provided they are material, or that they affect the grounds of the action or defence: *post*. Thus, if the plt. declares that the deft. is indebted to him on his promissory note, and the general is-

sue is pleaded, the plt. must prove the affirmative of the issue, by giving evidence of the deft.'s signature to the note, as that proves his averment, "that the deft. did undertake to pay," &c. And, when the issue is joined on the whole declaration, as in cases where the deft. pleads the general issue, all the affirmative averments in the declaration must be proved in their order. In an action for a loss by barratry of the master, the plt. need not prove that the master was not the owner: *Ross v. Hunter*, 4 T. R. 33, 38. And, in an action on an agreement to pay the plaintiff £100, in consideration of his not consigning any herrings to the London market, and in particular to the house of Messrs. M., it was held sufficient to prove that the plt. had not consigned any to that house, as it was for the deft. to show that herrings had been consigned to the London market: *Calder v. Butherford*, 3 B. & B. 302; 7 Moo. 158.

The above rule admits, however, of some exceptions; as, where the deft. pleads a wrongful act of the plt. in justification, the plt. must negative that act, and prove his whole case, before any evidence is offered in defence: *Rees v. Smith*, 2 Stark. 31. And, on a charge of nonfeasance or breach of duty, where the gist of the cause of action stated in the declaration is a negative, plt. must prove it, if the deft. put it in issue by his plea, as no person is presumed to have acted illegally; therefore, the omission of a duty must be proved, and though it involve a negative. In a suit for tithes in the Spiritual Court, the deft. pleaded that the plt. had not read the thirty-nine articles; and, being called upon to prove that negative, deft. moved for a prohibition, and was refused: *Monke v. Butler*, 1 Roll. Rep. 83; 3 East, 199; *Rex v. Mawkins*, 10 ib. 216. In an action upon 29 G. 3, c. 26, for selling goods by auction in a place where the deft. was not a householder, some proof of the negative must be given by the plt. So, likewise, upon a breach of covenant, that the deft. did not leave the premises well repaired, this breach, though involving a negative, must be proved: 1 Phil. Ev. 186. Where the plt. declared against the deft., who had chartered his ship for having put on board a dangerous commodity (by reason of which a loss happened), without due notice to the captain, or any other person employed in the navigation, it was held that the plt. was bound to prove this negative, namely, the want of notice: *Williams v. E. I. Comp.* 3 East, 192. So, where the gist of a plea (not consisting of a traverse) is negatived, as the plea, *ne unques* executor, &c.: *Gilb. Ev.* 145.

Where the law presumes the affirmative, a presumption of law must be disproved; as, if a bond be outstanding for twenty years, the law presumes it paid. If payment, therefore, be pleaded to an action upon such a bond, the plt. will have to negative that presumption: 1 Phil. Ev. 187. Where a servant is in the habit of receiving money for, and paying it over to, his master, without vouchers, the presumption is, that he pays over all he receives; and, in an action against him for money had and received, the master must not only prove that he received the money, but also that he has not accounted for it: *Evans v. Birch*, 3 Camp. 10. The legitimacy of a child born in lawful wedlock being presumed, the party who denies it must disprove it: *Banbury Peerage case*, 2 S. N. P. 709. After the period of gestation, subsequently to a divorce *a mensa et thoro*, the presumption is against the legitimacy, and access

must be shown: 1 *Salk*. 123. The party asserting the death of any person, must give evidence of it, *Wilson v. Hodges*, 2 *East*, 312, *ante*, 402; but the presumption of the continuance of life ceases after seven years from the time the person was last known to be living: *Doe d.*

*George v. Pesson*, 6 *East*, 80; *Doe d. Lloyd v. Deakin*, 4 *B.* [491] & *A.* 434. A person who went to sea at a particular time, was presumed to have died at the end of seven years from that time: 1 *East*, 80, 85. On a plea of coverture to an action of assumpsit, the deft., having shown that her husband went abroad twelve years before, was required to prove that he was alive within seven: *Hopewell v. De Pinner*, 2 *Camp.* 113; *Doe d. Banning v. Griffin*, 11 *East*, 293, *ante*, 9. This period has been adopted from analogy to the statute of bigamy, and the statute concerning leases determinable on lives. 1 *Phil. Ev.* 187.

If a particular fact lie more particularly within the cognizance of one party, that party must prove it, though a negative: *Rex v. Durdett*, 4 *B. & A.* 140; 5 *M. & S.* 211. If deft., under his set-off, give in evidence promissory notes, dated before the bankruptcy, he must also show they were obtained by him before: *Dickson v. Evans*, 6 *T. R.* 57. In an action on the game laws, though the plt. must aver that the deft. was not duly qualified, it will be for the deft. to prove that he was: *Spicres v. Parker*, 1 *T. R.* 144; *Jelfs v. Ballard*, 1 *B. & P.* 468; 2 *B. & P.* 307; 1 *East*, 650; *Rex v. Jenner*, 5 *M. & S.* 206. In an action for practising as an apothecary, without a certificate according to 55 *G.* 3, c. 194, the proof of the certificate lies on the deft.: *Apoth. Comp. v. Bentley*, 1 *R. & M.* 159; *ante*, 89. Where the deft. pleaded infancy, and the plt. replied a subsequent promise after full age, mere proof of a promise was held sufficient on the part of the plt., and that it lay on the deft. to show the incapacity, as being peculiarly within his own knowledge: *Borthwick v. Caruthers*, 1 *T. R.* 648.

THE SUBSTANCE ONLY OF THE ISSUE NEED BE PROVED. It is a general rule of evidence, that, if the substance of the issue, or the material facts contested by the pleadings, be established, it is sufficient; and that no proof is necessary as to such averment or parts of the issue as do not affect the grounds of the action or defence. Thus the averment of a particular day in the declaration need not be proved, except in the action of ejectment, on penal statutes, or where it makes part of the contract on which the action is brought, as in suits on bonds, bills of exchange, or the like, and forms part of the contract itself. And, on the same principle, it is immaterial, in transitory actions, to prove the place stated in the pleadings, as no locality can be attached to such a contract. But, if the action be local, as where the land is concerned, proof must be given; therefore, in trespass, *quare clausum fregit*, or in ejectment, the description of the premises must be proved to be in the place stated, and a wrong county or parish is fatal: *ante*, 451. And the same rule holds as to the proof of any specific number or quantity alleged in the pleadings; thus, in waste for cutting down twenty trees, proof of any smaller number cut down is sufficient: *Co. Lit.* 282, a.; *Hob.* 53. On a count for a voluntary escape, the plt. may prove an escape through negligence: *Bonafous v. Walker*, 2 *T. R.* 126. And, on a count for a total loss, proof of a partial loss is sufficient: *Gardiner v. Croasdale*, 2 *Burr.* 904. In

assumpsit on debt on a similar contract, the plt. may prove and recover less than the sum demanded in the writ: *M'Quillin v. Cox*, 1 H. Bl. 249. In slander, it is now allowed to be sufficient, if the plt. prove some material part of the words laid; and, if his count contain several additional words, he is entitled to a verdict on proving some of them: *Compagnon v. Martin*, 2 W. Bl. Rep. 790. To a plea of tender, if the plt. reply a subsequent demand of the sum tendered, he must prove a demand of that exact sum, and demand of a larger sum does not support the issue: *Rivers v. Griffiths*, 4 B. & A. 630; *Spyley v. Hyde*, 1 Camp. 181. If a plea in trespass aver two matters, either of which is a good justification, though both be put in issue by the replication, proof of one is sufficient: *Spilsbury v. \*Miclethwaite*, 1 Saund. [\*492] 146. When the declaration, for a false return to a *fi. fa.* against the goods of two, averred that both had goods, it was held sufficient to prove that one had goods within the bailiwick: *Jones v. Clayton*, 3 M. & S. 349. The same rule of law applies to criminal cases: so much of the indictment only need be proved, as charges the deft. with a substantive crime; as, when charged with composing, printing, and publishing a libel, he may be convicted only of printing and publishing: *Rex v. Hunt*, 2 Camp. 583; *Rex v. Williams*, *ib.* 646; 2 East's P. C. 515.

As to *Immaterial Averments*, the rule is, that, if the whole of an averment may be struck out without destroying the right of action, it will not be necessary to prove it; but, if an essential part of the cause of action be lost thereby, the whole amount, though unnecessarily particular must be proved: *Williamson v. Allison*, 11 East, 452. In an action against the sheriff, for taking the goods of a tenant without leaving a year's rent, the declaration averred a contract between the plt. and the tenant, as was necessary, and also stated some particulars of the demise relative to the time of payment, which were necessary; yet, as no part of the contract, being in its nature entire, could be struck out, the unnecessary averments became material to be proved: *Bristow v. Wright*, 2 Doug. 664; 5 T. R. 496; 2 East, 450, 452; 8 East, 9. But, where, in tort for a breach of warranty, the declaration averred that the deft. knew the goods to be unfit for sale, as this averment might be struck out without destroying the right of action, the plt. recovered without proving the deft.'s knowledge: *Williamson v. Allison*, 11 East, 452; 2 East, 446.

*Matters of Inducement.*] Averments which are merely matters of inducement, need not be proved with such precision as those which relate to the gist of the issue: 1 N. R. 210. In an action for double the value of goods, removed to prevent distress a certain sum was stated to be in arrear, but proof of notice of distress for a less sum was held sufficient. Here the averment of rent in arrear was necessary, the amount immaterial; and the damages to be measured, not by the quantity of rent, but the value of the goods: *Gwinnett v. Phillips*, 3 T. R. 643; 1 Ph. Ev. 195. See "VARIANCE."

THE EVIDENCE MUST BE CONFINED TO THE ISSUE.] Such evidence alone ought to be admitted as relates to the questions in issue, and supports the several averments in the pleadings. As it must be considered



with reference to the subject-matter, its relevancy must depend entirely on the circumstances of each particular case. In a question between landlord and tenant, whether the rent was payable quarterly, it is obviously irrelevant to inquire what agreements subsisted with other tenants, or when their rents were payable: *Carter v. Pryke*, *Pea. Rep.* 94. And, in an action against the acceptor of a bill of exchange, if his defence be that the acceptance is a forgery, evidence that the person suspected of forgery has forged the deft.'s name to another acceptance is inadmissible: *Balcetti v. Lerani*, *Pea.* 142; *Pea. Ev.* 111; *Viney v. Bans*, 1 *Esp. Rep.* 293; see, also, for other instances, *Holcombe v. Hewson*, 2 *Camp.* 391; *Spencley v. De Willot*, 7 *East*, 108. In order, however, to discover, the knowledge or motives of a party, it seems sometimes necessary to admit evidence of other transactions. Thus, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or had given the drawee authority to make it payable to a fictitious name, the plt., an endorsee, offered evidence that the deft. had accepted similar bills before they could, according to their date, have arrived from the place of date; and the opinion of the majority of the judges in the House of Lords was, that such evidence ought to have been received: *Hunter v. Gibson*, 2 *H. Bl.* 288.

\*Evidence of customs in other manors, &c., is, on the same [\*493] principle, admissible; and the custom of one manor or parish cannot be given in evidence to explain the customs of another: 1 *Str.* 661; *Cowp.* 807; 2 *Doug.* 512; 12 *East*, 63; 3 *Gwill.* 396. Yet, where all the manors in a certain district are held by the same tenure, and a question relating to an incident of the tenure arises in one of the manors; the usage prevailing in any of the others is admissible in evidence: 3 *Keb.* 90; *Str.* 658. Thus, the custom of tithing in one parish is not evidence of the custom in another, unless the custom is laid as the general custom of the country, *Furneaux v. Hutchins*, *Cowp.* 803; and where, by the custom of the country, half a river belongs to the lords of the manors on each side, proof of a custom in one manor is evidence of the same customary right in the other, being evidence of a custom pervading one common district of manors: 1 *M. & S.* 662. In an action where the defence was a modus for a particular farm in a township, and the witnesses proved an uniform payment for fifty years of a certain sum in lieu of tithes, they were asked, in cross-examination, whether other tenements in the township did not pay a similar sum; for this question was not put by the deft. to prove a modus for a particular farm, but by the plt. to prove a composition pervading the district of which that farm was a part: *Blundell v. Howard*, 1 *M. & S.* 292.

Acts of ownership done in one close have been admitted to show a right to another, when a reasonable probability is previously established that the whole land had been formerly in one owner, and all subject to the same burdens: 1 *B. & C.* 219. In trespass, where the trees in question grew in an extensive and undivided belt, contiguous to a number of closes of several owners, one of which was the deft.'s, and the plea was, that the place in which they grew was the soil and freehold of the deft., and the plt. replied that the trees were his trees and freehold, evidence was admitted of acts of ownership in other parts of the belt, submitted

to by the owners of the other adjoining closes, as evidence of a general right throughout the whole belt, which might be presumed to have formerly belonged to one owner: *Sir T. Stanley v. White*, 14 *East*, 332. But leases granted by the lord on other parts of the waste are not admissible to prove the soil and freehold of a certain portion of common land in the lord, unless it be first shown that the *locus in quo* formed part of one entire waste, to which such acts of ownership were applied: *Tyrwhit v. Wynn*, 2 *B. & A.* 554. And acts of ownership by the proprietors of a canal, done in one part of the banks, were not evidence of right over other parts; because as the canal passed through the lands of different persons, there was no unity of ownership, or distinct unity of character previously established: *Hollis v. Goldfinch*, 1 *B. & C.* 205; 2 *D. & R.* 316. And on the principle of the necessity of confining the evidence to the issue, the character of either party cannot be inquired into, in a civil suit, unless put in issue by the nature of the proceedings, *B. N. P.* 298; as, in ejectment, brought by the heir at law to set aside a will, for the fraud and imposition of the deft., evidence of the deft.'s good character is not to be received, *ib.*; see 1 *Camp.* 207, 209. But, in an action for slander, the plt. has been allowed to give evidence of his previous good character: *King v. Waring*, 5 *Esp. Rep.* 13. In an action for a malicious prosecution, the deft. after having first proved circumstances of suspicion relative to the particular transaction, has been permitted to give evidence of the general bad character of the plt.; because this was evidence of a probable cause for the prosecution, which was the question in issue: *Rodriguez v. Tadmire*, 2 *Esp. Rep.* 720; *Newsam v. Carr*, 2 *Stark.* 69. In an action for a libel, the deft. may not prove the plt. guilty of the crime imputed to him, unless he have put it in issue by a special justification, 2 *Str.* 1200, 2 *S. N. P.*

\*986, n. 6; but in mitigation of damages, evidence that the plt. [\*494] at the time was generally suspected of the crime imputed is admissible, *Earl of Leicester v. Walter*, 2 *Camp.* 251, ——— v. *Moor*, 1 *M. & S.* 284; but general evidence of the plt.'s bad character is not, 11 *Price* 235. So, in an action for crim. con., the deft. may prove, in mitigation of the damages, that the wife had been previously connected with other men, or the husband with other women, *B. N. P.* 27, 296, 4 *T. R.* 641, or that she made the first advances, 1 *S. N. P.* 25; *Elsam v. Fancett*, 2 *Esp. Rep.* 562. In actions for seduction, also, similar evidence is received: *Bamfield v. Massey*, 1 *Camp.* 460; 2 *ib.* 519. The party against whom such evidence is given may rebut it, but with this distinction: if evidence be offered of general bad character, it may be met with evidence of general good character; but, if particular instances of bad conduct are established, they are not to be answered by evidence of general good character, but by disproving the facts alleged: 1 *Camp.* 460. Evidence of good character, however, cannot be given by the plt in actions of crim. con. and seduction, until evidence to impeach the character has been offered by the deft.: *ib.* And, where the plt.'s witnesses, on cross examination, deny the questions of imputation, the plt. is not allowed to give evidence of his good character: 3 *Esp. Rep.* 116.

When a bill of particulars has been delivered, the plt. will be preclud-

ed from giving evidence of any demand not contained in his particular: see "*Particulars*."

No evidence need be adduced to prove facts admitted on the pleadings or record, or by payment of money into court: see "*Admissions*."

#### COURSE OF EVIDENCE.

*Who is to begin.*] The party who has to prove the affirmative of the issue is entitled to begin. Where the general issue is pleaded, or issue is joined on any averment of the plt., it is the plt.'s whose evidences are first adduced; but, where issue is joined on any averment of new matter by the deft., as a release in assumpsit, or right of way in trespass, the deft. has the right of being first heard: *Tidd*, 908. Where there are several issues, some of which are to be proved by the plt. and others by deft., the plt. is to begin, and give evidence of those which are to be proved by him; the deft. is next to offer evidence to establish the issues on his part, and, at the same time, controvert the proofs of the plt.; then the plt. is entitled to adduce testimony for disproving or answering the affirmative evidence of the deft.; afterwards, the deft.'s counsel has the right to a reply, limited to the evidence adduced, in answer to his affirmative; and, finally, the plt.'s counsel has the right to a general reply upon the whole case: *Jackson v. Hesketh*, 2 *Stark*. 521; 1 *Stark. Ev.* 382. But if, in trespass, the general issue be pleaded only as to the force and arms, and whatever else, &c., and a special plea as to the rest, the proof of the issue upon which special plea lies on the deft., the deft. is entitled to begin: *ib.*; see *ante*, 9, as to plea in abatement, &c.

*The Right to Reply.*] The party who begins has the right of reply, in case the other party offers any evidence. If the deft.'s counsel, after opening facts to the jury, give no evidence to prove them, the plt. has not strictly the right to reply, but it is in the discretion of the court to permit it, *Crebar v. Sodo*, *M. & M. C.* 85; but, if the deft. put in the rule for payment of money into court, it would seem that, in the K. B., the plt. has the right to reply: *ib.* If, to prove part-payment, the deft. rely upon the particulars of demand given by plt. under a judge's order, containing a credit for certain sums, this is such evidence on the part of the deft. as entitles the plt. to address the jury in reply: *Rymer v. Cook*, *M. & M.* 86, *n.* But, according to a rule of the Court

[\*495] \*of C. P., the production of a rule to pay money into court is not such evidence as to give the plt.'s counsel the right of reply: *ib.*; 2 *Taunt.* 267. If evidence is offered by the deft., the plt. may give evidence in answer; and, in that case, the deft. is entitled to a limited, and afterwards the plt. to a general, reply: *Stark. Ev.* 382. It was, indeed, laid down as a general rule by *Ld. Ellenb.*, that when, by the pleadings or notice, the defence is known to the plt., his counsel is bound to prove his whole case in chief, and cannot go into general evidence in reply: *Rees v. Smith*, 2 *Stark.* 31. But the practice is now altered, and the plt.'s counsel is at liberty either at once to enter into the whole of his case, or to make out a *prima-facie* case only, and reserve his answer to the deft.'s case for the reply: *Browne v. Murrey*, 1 *R. & M.* 254; *Sylvester v. Hall*, *ib.*, 255; 1 *Stark. Ev.* 383. In ejectment

by a person claiming under a will against one who claims under a codicil, if the deft. will admit the will, he is entitled to begin, and to have the general reply: *Doe v. Corbett*, 3 *Camp.* 368; *Pea. Ev.* 6. And where, in ejectment by the heir-at-law against the devisee, the lessor of the plt. proved his pedigree and stopped, and the deft. set up a new case, which the lessor answered by evidence, it was held that the deft. was entitled to the general reply: *Goodtitle v. Braham*, 4 *T. R.* 497. But it has been said, that, where the deft. brings evidence to impeach the plt.'s case, and also sets up an entire new case, which the plt. again controverts by evidence, the deft.'s reply is to be confined to the new case set up by him; for upon the plt.'s first case the deft. has already commented in opening his own: 1 *Stark. Ev.* 384.

Where several defts. in the same interest defend separately, it has been ruled by *Gibbs, C. J.*, that the senior counsel can alone address the jury, and the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint, and not separate, *Chippendale v. Mason*, 4 *Camp.* 174; but, in practice, it is usual to allow several counsel in such case to address the jury, though not to examine the witnesses severally. *R. v. Williamson*, 3 *Stark.* 162.

#### DEMURRER TO EVIDENCE.

A demurrer to evidence is analogous to a demurrer in pleading; the facts alleged are confessed, and the law arising upon those facts is referred to the decision of the court. The ordinary office of the judge is to declare to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and the fact; but, if the party wish to withdraw from the jury the consideration of the law, and its application to the fact, he demurs to the evidence: 1 *Phil. Ev.* 297; *Gibson v. Hunter*, 2 *H. Bl.* 206; 1 *C. & P.* 237. The whole proceeding upon demurrer to evidence is under the control of the judge who tries the cause, who may overrule the demurrer, and thereupon the party demurring may tender a bill of exceptions: *B. N. P.* 314; 2 *H. Bl.* 209. Where the evidence is certain, as where it consists of matter of record, or other matter in writing, the party offering the evidence may be compelled to join in demurrer, or waive the evidence, 2 *H. Bl.* 206; but, on a demurrer to substantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit, upon the record, every fact and every conclusion which the evidence offered conduces to prove: *ib.* 187. A demurrer to evidence admits not only those facts of which positive proof is made, but also those inferences and conclusions which are, by fair presumption, deducible from the fact so proved: *Fanshaw v. Cocksedge*, 3 *Bro. P. C.* 690, *s. c.*; 1 *Doug.* 218. Therefore, on a demurrer to evidence, the party cannot take advantage of any objection to the pleadings: *Cort v. Birkbeck*, 1 *Doug.* 218. Where a demurrer to evidence is admitted, it is usual for the judge to give orders to the associate to take a note of the testimony, which is signed by the \*counsel on [\*496] both sides, and the demurrer is affixed to the postea: *B. N. P.* 313; *Tidd*, 916. The damages may be assigned either by the principal jury conditionally before discharged, or by another jury on a writ of

inquiry, after the demurrer is determined; and it is said to be the most usual course, upon such a demurrer, to discharge the jury without further inquiry: *ib.*



## EXECUTORS AND ADMINISTRATORS, ACTIONS BY.

FORM OF REMEDY, AND WHEN THEY MAY SUE, 496.

FORM OF PLEADINGS, 497.

PRECEDENTS, 499.

EVIDENCE FOR PLAINTIFF, 503.

EVIDENCE FOR DEFENDANT, *ib.*

### *Form of Remedy, and when they may sue.*

THERE is nothing peculiarly distinguishing the form of remedy for these parties from others.

In the case of personal contracts or covenants, which run not with the land, where the party to whom they are made is dead, the executor of such party is entitled to maintain an action for the breach of them: *Brandon v. Pate*, 2 *H. Bl.* 310; *Webb v. Russell*, 8 *T. R.* 403. But this position will not hold, where the covenants run with the land, because they pass to the person to whom the land descends, *ib.* 401, *Lucy v. Levington*, 2 *Lev.* 26; and an executor cannot maintain any action for such breaches, without showing some special damage to the testator in his lifetime, or that the plt. claimed some interest in the premises: *Kingdom v. Nottle*, 1 *M. & S.* 355; 4 *ib.* 53; *King v. Jones*, 1 *Marsh.* 107; 5 *Taunt.* 418, *s. c.*, affirmed in 4 *M. & S.* 188; *Knight v. Quarles*, 2 *B. & B.* 103. Executors, &c. may sue in their representative character, in all cases, where the money, when recovered, would be assets: *King v. Thorn*, 1 *T. R.* 487; *Ord v. Fenwick*, 3 *East*, 104; *Petrie v. Hanway*, 3 *T. R.* 659. They can only sue in those cases where the breach of a contract is of such a nature as to render the personal estate of the deceased less beneficial to the executor: *Chamberlain v. Williamson*, 2 *M. & S.* 408, 216, *a.* Therefore, the executor cannot sue on a promise of marriage to the testator, such agreement not having for its end the increase of the personal fund: *ib.* And, for the breach of the implied contract of an attorney to investigate the title to an estate, the executor of the purchaser cannot sue without showing that the testator sustained some actual damage: 4 *Moo.* 535; 4 *B. & A.* 474.

As to contracts entered into with themselves, they may sue in all cases where the money, when recovered, would be assets, *Bull v. Palmer*, 2 *Lev.* 165; as, on a note endorsed by him in that character, *King v. Thorn*, 1 *T. R.* 487, *Catherwood v. Chaband*, 1 *B. & C.* 154, 2 *D. & R.* 271; or for goods sold by him as executor, *Corvell v. Watts*, 6 *East*, 405; or for money paid by him, *Ord v. Fenwick*, 3 *East*, 104; or for money paid and received to his use as executor, *Petrie v. Hanway*, 3 *T. R.* 659; or upon an account stated with him respecting money due to him as executor: *Heashall v. Roberts*, 5 *East*, 150; *Thompson v. Stent*, 1 *Taunt.* 322; *Richardson v. Griffin*, 2 *Chit.*

*Rep.* 325. But they may sue without stating that they are executors: *Brassington v. Ault*, 2 *Bing.* 177.

\*Where there are several executors or administrators, they must all be joined, though some be under seventeen, or have [\*497] not proved the will, or have even refused: *Webster v. Spencer*, 3 *B. & A.* 363, 96. But, if one has formerly renounced, he need not be joined: 4 *T. R.* 565. And, where a promise is made to executors, but not expressly in that character, they need not all join; and it will be sufficient for those who actually contracted to sue, if they do not style themselves executors: *Brassington v. Ault*, 2 *Bing.* 177. The nonjoinder of executors or administrators, must be taken advantage of by plea in abatement, *ante*, 14. If they sue without stating themselves to be executors, &c., they will be nonsuited, &c.: *ante*, 496, *post*, 498.

If an executrix or administratrix marry, she and her husband must join for the breach of a contract made with the testator, &c., *Com. D. Bar. and Fem. V.*; and, if she sue alone, it is matter of abatement, *Milner v. Milnes*, 3 *T. R.* 631, *ante*, 6; but the husband may sue alone, on a contract made to husband and wife as executrix: *Ankerstein v. Clarke*, 4 *T. R.* 616; *Yard v. Ellard*, 1 *Salk.* 117. An infant sole executor cannot sue till of full age: 38 *G. 3*, c. 87; *Toller*, 367.

When an executor or administrator dies, rights belonging to him, as such, pass to the representative, not of his own, but his testator's or intestate's estate, as on breaches of contract made with the testator, or judgments recovered by the executor thereon; and in other cases, where the money to be recovered would be assets of the representatives of the original testator himself, *Partridge v. Court*, 5 *Price*, 412, *Hamm.* 136, *Chit. Pl.* 14; and, in such case, there must be an administrator, *de bonis non*, appointed; 2 *Saund.* 72, m. [f.] And, where a contract is made with an administrator in that character, and he dies intestate, without having sued upon such contract, the administrator *de bonis non* may sue, for he succeeds to all the legal rights which belonged to the administrator in his representative capacity, *Catherwood v. Chiband*, 1 *B. & C.* 154, 2 *D. & R.* 271; and, therefore, he may sue the acceptor of a bill of exchange, endorsed to his administratrix, in payment of a debt due to the original intestate, *ib.*; and may join such a cause of action with counts upon promises made to the intestate: *Hirst v. Smith*, 7 *T. R.* 182.

In the case of torts, when the action *must* be in formâ *ex delicto*, for the recovery of damages, and the plea thereto not guilty, executors cannot sue, it being a maxim, that *actio personalis moritur cum persona*: 1 *Saund.* 216, 7; 3 *Bl. C.* 302; *Hambly v. Trott*, *Cowp.* 371 to 377; *Chamberlain v. Williamson*, 2 *M. & S.* 408. But, with respect to some injuries to *personal property*, by 4 *Edw.* 3, c. 7, executors and administrators, and their executors and administrators, may have remedy by action for every description of injury to personal property, by which it has been rendered less beneficial to the executor, whatever the form of action may be: *ib.* 416; and see the cases in 1 *Chit. Pl.* 59. Executors have no remedies for injuries committed to real property in their testator's lifetime: 1 *Saund.* 207, n.; *Sir W. Jones*, 174; *Williams v.*

*Bredon, B. & P.* 330; *Emerson v. Emerson*, 1 *Vent.* 187. For injuries to the real estate after the death, the executor may sue.

### *Form of Pleadings.*

*Declaration.*] There is, in general, nothing peculiar relating to the form of the declaration in actions by executors. In every declaration by an executor or administrator as such, he should describe himself accordingly in the commencement, though indeed it will suffice if the fact appear in other parts of the declaration, 1 *Saund.* 11, 112, *n.* 2; and, in stating a debt or promise to him, the word "as" executor, &c. must be inserted, or the omission will be fatal, even after verdict: *Henshall v. Roberts*, 5 *East*, 150; *Powley v. Miston*, 2 *Marsh.* 151. In actions of debt, the words "owes to" should be omitted in the commencement: *Com. D. Pleader*, 2 *D.* 1, 2 *W.* 8; 1 *Saund.* 1, 112, *n.* 1; 3 *East*, 2.

After the conclusion, to the damage, &c., and before the pledges, a *profert* of the letters testamentary, or letters of administration, should be made: *Bac. Ab. Executor, C.*, *Doug.* 5, in notes; *Carth.* 69. In an action on a note endorsed to the plt. by an administrator, no *profert* is necessary, because the plt. is not entitled to the custody of the letters of administration, which, however, must be proved on the trial: *Willes*, 560. The omission of the *profert* is now aided, unless the deft. demur specially for the defect: 4 *Anne*, c. 16, s. 1.

Wherever it is material for the plt. to avail himself of a promise or acknowledgment, or other cause of action, since the death of the testator, a count should be inserted to meet the same, for otherwise such promise or acknowledgment, or other cause of action, cannot be given in evidence, *Sarell v. Wine*, 3 *East*, 409, *Hickman v. Walker*, *Willes*, 29, *Pittam v. Foster*, 2 *D. & R.* 363, 1 *B. & C.* 248, *s. c.*, 5 *Moo.* 105, 508, *Ward v. Hunter*, 6 *Taunt.* 210, *Hurst v. Parker*, 1 *B. & A.* 93, *Short v. Macarthy*, 3 *B. & A.* 626; but, if there be no particular use in such count it should be omitted, as it would subject the plt. to costs, if he did not succeed in the action: *ib.*; *Tidd*, 1014, 5; 1 *Bing.* 249; 8 *Moo.* 146, *s. c.*

Care must be taken in the declaration, not to join a demand which the plt. may recover in his own right. The best rule of determining what demands may be joined, is to consider whether the sum, when recovered, would be assets; if it would be so, it may be joined: *Thompson v. Stent*, 1 *Taunt.* 322; *Powley v. Newton*, 2 *Marsh.* 147; 6 *Taunt.* 455; *Bull v. Palmer*, 2 *Lev.* 165; *King v. Thorn*, 1 *T. R.* 489; 2 *Saund.* 117, *d.* An executor may declare as such, on a note made to him as such since the death, *Partridge v. Court*, 5 *Price*, 412, *Court v. Partridge*, 7 *Price*, 591, 1 *T. R.* 487, *Cowell v. Watts*, 6 *East*, 410; or for money lent by him as such, *Webster v. Spencer*, 3 *B. & A.* 360; or for money paid by him as such, *Ord v. Fenwick*, 3 *East*, 104; or for money had and received to his use as such, *Petrie v. Hannay*, 3 *T. R.* 659, 2 *Saund.* 207; or on an account stated with him as such, whether of moneys due to him as such, or to the testator, *Henshall v. Roberts*, 5 *East*, 150, 6 *East*, 403, 1 *T. R.* 487, 1 *Taunt.* 322, 2 *Marsh.* 147; and, in these cases, counts to meet such claims may

be joined with counts on promises to the testator. But an executor cannot declare as such on a bond given to him since the death: *Hobier v. Arundell*, 3 B. & P. 7; *Partridge v. Court*, 5 Price, 512; *Court v. Partridge*, 7 Price, 591.

*Plea.*] Besides the ordinary defences, the deft. may, by his plea, deny the plt.'s representative character, by pleading *ne unques executor* or *administrator*, or deny the fact, under either of which pleas he may dispute the sufficiency of the grant of probate or administration, by reason of the defective stamp, &c.: *Thynne v. Protheroe*, 2 M. & S. 555; 1 Sid. 250. Where letters of administration have been obtained in an inferior diocese, the deft. may plead in bar that these were *bona notabilia*, and may give that fact in evidence under the plea of *ne unques executor*: 1 *Saund.* 274, n. 3. But, if he contends the intestate did not live in the diocese at the time of his death, he should plead it specially, and the mere denying the grant of administration to plt. will not suffice: *Stokes v. Bate*, 5 B. & C. 496.

### \*Precedents.

[\*499]

#### BEGINNING OF A DECLARATION BY AN EXECUTOR IN K. B.

Ellenborough.

Trinity Term, 9 Geo. 4.

Middlesex (*venue*) (to wit) A. B. (the plt. in this suit), executor of the last will and testament of E. F., deceased, complains of C. D. (the deft. in this suit), being in the custody, &c. (*as usual, except in debt, when the words, "owes to and," should be omitted, "Declaration."*)

#### THE LIKE IN C. P.

In C. P.

Trinity Term, 9 Geo. 4.

Middlesex (*venue*) (to wit.) C. D. was attached (*or, "summoned"*) to answer A. B., executor of the last will and testament of E. F., deceased, of a plea of trespass, &c. (*or as the plea is*); and thereupon the said A. B., executor as aforesaid, by G. H., his attorney, complains, that, whereas, &c.

#### THE LIKE IN THE EXCHEQUER.

In the Exchequer of Pleas.

Trinity Term, 9 Geo. 4.

Middlesex (to wit.) A. B. executor of the last will and testament of E. F., deceased, and a debtor to our lord the now king, for the debts of the said E. F., cometh before the barons, &c., on, &c. (*as usual, see ante, "Declaration."*)

#### COMMENCEMENT OF A DECLARATION BY THE EXECUTOR OF AN EXECUTOR.

Middlesex (to wit.) A. B., executor of the last will and testament of E. F., deceased, which said E. F., in his lifetime, and at the time of his death, was executor of the last will and testament of G. H., deceased, complains, &c.

#### BY AN ADMINISTRATOR AGAINST AN ADMINISTRATOR.

Middlesex (to wit.) A. B., administrator of all and singular the goods, chattels, and credits, which were of E. F., deceased, at the time of his death, who died intestate, complains of C. D., administrator of, &c., being in the custody, &c. (*as usual.*)

#### PROPERTY BY AN EXECUTOR.

(*This should be inserted at the end of all declarations by executors.*) And the said plt. brings into court here the letters testamentary of the said E. F., deceased, whereby it fully appears to the said court here that the said plt. is executor of the last will and testament of the said E. F., deceased, and hath the execution thereof, &c.

#### PROPERTY BY THE EXECUTOR OF AN EXECUTOR.

And the said plt. brings into court here as well the letters testamentary of the said E. F., deceased, as the letters testamentary of the said G. H., deceased, whereby it fully appears to



the said court here that the said E. F., in his lifetime, was executor of the last will and testament of the said G. H., deceased, and that the said A. B. is executor of the last will and testament of the said E. F., deceased, and hath the execution of the last wills and testaments of the said E. F. and G. H. respectively, &c.

#### PROPERT BY A SURVIVING EXECUTOR.

And he brings into court here the letters testamentary of the said E. F., deceased, whereby it fully appears to the said court here that the said plt. and G. H., in the lifetime of the said G. H., were executors of the last will and testament of the said E. F., deceased; with this, that the said plt. will verify that the said G. H. is deceased, and that he, the said plt., hath thereby become and is the surviving executor of the last will and testament of the said E. F., deceased, and hath the execution thereof, &c. Pledges, &c.

#### USUAL STATEMENT OF LETTERS OF ADMINISTRATION, AND PROPERT BY AN ADMINISTRATOR.

Yet the said deft., not regarding his said several promises and undertakings, but contriving and fraudulently intending to deceive and defraud the said E. F., in his lifetime, and the said plt., as administrator as aforesaid, after the death of the said E. F., to which said plt., after the death of the said E. F., to wit, on, &c. (*date of grant*), at, &c. (*venue*) aforesaid, administration of all and singular the goods, chattels, and credits which were of the said E. F., deceased, at the time of his death, who died intestate, Charles, by divine Providence, Archbishop (*according to fact*) of —, Primate of all England, and metropolitan, in due form of law, was granted in this behalf, hath not as yet paid the said sums of money, [*\*500*] "or any part thereof, to the said E. F., in his lifetime, or to the said plt., administrator as aforesaid, since the death of the said E. F., although often requested so to do, hath hitherto wholly refused and still refuses to pay the same, or any part thereof, to the said plt., administrator as aforesaid, to the damage of the said plt., as administrator as aforesaid, of £100; and therefore he brings his suit, &c. And the said plt. brings into court here the letters of administration of the said archbishop (*or bishop*), which give sufficient evidence to the said court here of the grant of administration to the said plt., as aforesaid, the date whereof is the day and year in that behalf above mentioned, &c. Pledges, &c.

#### DECLARATION BY AN EXECUTOR ON PROMISES TO THE TESTATOR.

(*Commencement as ante, 449.*) For that whereas the said deft., in the lifetime of the said E. F., on, &c. (*some day in testator's lifetime*), at, &c. (*venue*), was indebted to the said E. F., in the sum of £50, of lawful money of Great Britain, for divers goods and chattels by the said E. F. before that time sold, &c. (*the subject-matter of the debt, whatever it may be, should be described after this mode*); and, being so indebted, &c. (*laying the promise to the said E. F. in his lifetime. The following is the form of the quantum meruit:*) And whereas, also, afterwards, and in the lifetime of the said E. F., to wit, on the day and year aforesaid, at, &c., aforesaid, in consideration that the said E. F. had before that time done, &c. And the said plt., executor as aforesaid, avers, that the said E. F., in his lifetime therefore reasonably deserved to have, &c., whereof, &c.; yet the said deft., not regarding, &c., but contriving, &c., to deceive and defraud the said E. F. in his lifetime, and the said plt. as executor as aforesaid, since the death of the said E. F., in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said E. F., in his lifetime, or to the said plt., executor as aforesaid, since the death of the said E. F. (although often requested so to do), but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plt., executor as aforesaid, to the damage of the said plt., as executor as aforesaid, of £—; and therefore he brings his suit, &c. And the said plt. brings into court here the letters testamentary, &c. (*add propret, as ante, 499.*) Pledges, &c.

#### COUNTS ON PROMISES TO PLOT AS EXECUTOR.

And whereas, also, the said deft., afterwards, and after the death of the said E. F., deceased, to wit, on, &c. (*some day after the death*), at, &c., aforesaid, was indebted to the said plt., as executor as aforesaid, in the sum of £—, of like lawful money, for divers goods, &c. (*as the subject-matter of the claim may be*), by him, the said E. F., in his lifetime, sold and delivered to the said deft. (*as the debt may be*), and at his special instance and request. And the said deft., being so indebted, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c., aforesaid, undertook, and then and there faithfully promised the said plt., as executor as aforesaid, to pay him the said sum of money in this count mentioned, when he, the said deft., should be thereunto afterwards requested. (*If the plt. in the character of executor has sold goods to the deft., or paid money for him, here add counts for goods sold, &c., by the plt. as executor, ante, 497—498; and, if the deft. has received money since the death of testator, add a count for money had and received to the plt.'s use, as executor, 2 Chit. Pl. 107.*)

## ACCOUNT STATED WITH PLT. AS EXECUTOR.

And whereas, also, the said deft., afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, accounted with the said plt., as executor aforesaid, of and concerning divers other sums of money from the said deft. to the said plt. as executor as aforesaid, before that time, (or, "to the said E. F. in his lifetime," and which is preferable, if the claim arose in the testator's lifetime, on account of costs, should the plt. not succeed, see ante, 498) due and owing, and then in arrear and unpaid; and, upon that accounting, the said deft. was then and there found to be in arrear and indebted to the said plt., as executor as aforesaid (or, "to the said E. F., in his lifetime"), in the further sum of £—, of like lawful money, and, being so found in arrear and indebted, he, the said deft., in consideration thereof, afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, undertook, "and then and there faithfully promised the said plt., as executor as aforesaid, to pay him the said sum of money last mentioned, whenever afterwards he, the said deft., should be thereunto requested. Yet the said deft., not regarding his said several two last-mentioned promises and undertakings (this should agree with the number of counts in which the promises are laid to plt.), so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt., as executor as aforesaid, in this respect, hath not yet paid the several sums of money in the said last-mentioned two counts specified (according to the counts in which the promises are laid to plt.), or any or either of them, or any part thereof, to the said plt., executor as aforesaid (although often requested so to do); but the said deft. to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse, to the damage, &c. (as ante, 499, adding profert.)" [501]

## BY SURVIVING EXECUTOR.

(In an action at the suit of a surviving executor, describe him accordingly in the beginning, and conclude as follows:) Yet the said deft., not regarding, &c., but contriving, &c., to deceive and defraud the said E. F. in his lifetime, and the said plt. and one G. H. in his lifetime, now deceased, and whom the said plt. hath survived (which said plt. and G. H., in the lifetime of the said G. H., were executors of the last will and testament of the said E. F., deceased), after the death of the said E. F., and the said plt., as surviving executor as aforesaid, since the death of the said G. H., in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof (although often requested so to do); but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plt., surviving executor as aforesaid, to the damage of the said plt. as surviving executor (as aforesaid, of £—; and therefore he brings his suit, &c. (Add profert by a surviving executor, as ante, 499.) Pledges, &c.

## BY HUSBAND AND WIFE, EXECUTRIX BEFORE MARRIAGE.

(to wit.) A. B. and C., his wife (which said C. is executrix of the last will and testament of D., deceased) complains of E. F., being, &c., for that whereas the said E. F., on, &c., at, &c., was indebted, &c. (as in the common case at the suit of an executor.) Yet the said E. F., not regarding, &c., but contriving, &c., to deceive and defraud the said D. in his lifetime, and the said C., as executrix as aforesaid, after the death of the said D., and whilst she was sole and unmarried, and the said A. B. and C., his wife, as executrix aforesaid, since their intermarriage, in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any part thereof (although often requested so to do); but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said A. B. and C., his wife, executrix as aforesaid, or to either of them, to the damage of the said A. B. and C., his wife, as executrix as aforesaid, of £—; and therefore they bring their suit. (Add profert and pledges.)

## DECLARATION BY AN ADMINISTRATOR ON PROMISES TO INTESTATE.

(Commencement as ante, 499.) For that whereas the said C. D., deft., in the lifetime of the said E. F., on, &c., at, &c., was indebted to the said E. F., &c. (as in the case of an executor, as ante, 500); and being so indebted, &c. (laying the promises to the said E. F. in his lifetime, and the breach will be as ante, 500.)

## THE LIKE ON PROMISES TO PLT.

(It may be advisable here to add counts on promises to the administrator as such, and which will run as in the precedent, ante, 500, using the word "administrator" instead of "executor.") To the damage of the said A. B., as administrator as aforesaid, of £—; and therefore he brings his suit, &c. (and the profert is as ante, 499.)

## BY A SURVIVING ADMINISTRATOR.

If the plt. be an administrator with the will annexed, or durante minore etate of an executor,  
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or next of kin, he must be described accordingly, as in the letters of administration; and, in the latter case, at the end of the declaration, there must be an averment that the executor or next of kin is under age. In an action at the suit of a surviving administrator, describe him [502] accordingly throughout, and "conclude as in the precedent, ante, 601, at the suit of a surviving executor, mutatis mutandis.

BY AN ADMINISTRATOR DE BONIS NON, WITH WILL ANNEXED.

(to wit.) A. B., administrator of all and singular the goods, chattels, and credits, which were of E. F., deceased, at the time of his death, left unadministered by G. H. in his lifetime, now deceased, and which said G. H. in his lifetime, and at the time of his death, was executor of the last will and testament of the said E. F., deceased, with the will of the said E. F., deceased, annexed, complains of C. D., being, &c., for that whereas the said deft., on, &c., at, &c., was indebted, &c. (*as usual*); yet the said deft., not regarding, &c., but contriving, &c., to deceive and defraud the said E. F. in his lifetime, and the said G. H. in his lifetime, now deceased, and which said G. H. in his lifetime, and at the time of his death, was executor of the last will and testament of the said E. F., deceased, and the said plt., after the death of the said G. H. (to which said plt., after the respective deaths of the said E. F. and G. H., to wit, on, &c., at, &c., aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said E. F., deceased, at the time of his death left unadministered by the said G. H., deceased, executor as aforesaid, with the will of the said E. F. annexed, by Charles, by divine Providence, Archbishop of Canterbury, primate of all England, and metropolitan, in due form of law, was granted), in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof (although often requested so to do); but howsoever hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plt., administrator as aforesaid, to the damage of the said plt., as administrator as aforesaid, of £—; and therefore he brings his suit, &c. (*Add proff of letters of administration.*)

See forms of *indebitatus assumpsit* by a surviving executor, 2 *Chit. Pl.* 104; by husband and wife, executrix before marriage, *ib.*, 105; by husband and wife, executrix after marriage, *ib.*; by a surviving administrator, *ib.*, 110; by administrator *durante minore etate*, *ib.*, 110; by husband and wife, administratrix, &c. *ib.*, 112; declaration by an executor to recover expenses of a party-wall, *ib.* 250. See, also, forms of declaration by an executor or administrator of payee of a note against the maker, *ib.*, 140; and the like on a promise after the death, *ib.*; by executor or administrator of payee, &c., against acceptor, *ib.*, 165; by executor of payee against drawer, where bill due after the death, *ib.*, 166.

DECLARATION BY EXECUTOR OF OBLIGEE OF A BOND AGAINST OBLIGOR.

Middlesex (to wit.) A. B., executor of the last will and testament of E. F., deceased, complains of C. D., of a plea, that he render to him the sum of £100, of lawful money of Great Britain, which the said C. D. unjustly detains (*ante*, 496) from him; for that whereas the said deft., in the lifetime of the said E. F., since deceased, to wit, on, &c., at, &c., by his certain writing obligatory, sealed with his seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said E. F. in the said sum of £100 above demanded, to be paid to the said E. F., or his certain attorney, executors, administrators, or assigns, when he, the said deft., should be thereunto afterwards requested. Yet the said deft. (although often requested so to do), hath not as yet paid the said sum of £100, above demanded, or any part thereof, to the said E. F. in his lifetime, or to the said plt., executor as aforesaid, since the death of the said E. F., but to pay the same, or any part thereof, to the said E. F. in his lifetime, or the said A. B., executor as aforesaid, since the death of the said E. F., the said deft. hath hitherto wholly refused, and still doth refuse, to pay the same, or any part thereof, to the said plt., executor as aforesaid, to the damage of the said plt., as executor as aforesaid, of £—; and therefore he brings his suit, &c. (*Add proff and pledges see ante, "Bond."*)

[503] See declaration in debt by an administrator of the obligee, 2 *Chit. Pl.* 466.

COUNT BY EXECUTOR IN TROVER, AND CONVERSION BEING AFTER TESTATOR'S DEATH.

And whereas, also, the said plt., as executor as aforesaid, afterwards, and after the death of the said E. F., to wit, on, &c., at, &c., was lawfully possessed of divers other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, as of his property, as such executor as aforesaid; and, being so possessed thereof, he, the said plt., afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same then and there came to the possession of the said deft. by finding. Yet the said deft., well knowing the said last-mentioned goods and chattels to be the property of the said plt., as such executor as aforesaid, and of right to belong and apper-

tain to the said plt., as such executor, but contriving and fraudulently intending to deceive and defraud the said plt., as such executor as aforesaid, in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any part thereof, to him, the said plt. (although often requested so to do), and hath hitherto wholly neglected and refused, and still wholly neglects and refuses, so to do, and afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, converted and disposed of the said last-mentioned goods and chattels to his own use.

See other counts on a trover and conversion in testator's lifetime, 2 *Chit. Pl.* 838; on a trover in his lifetime, and conversion after the death, *ib.*; and see form for trover by an administrator, *ib.*, 840.

### *Evidence for Plaintiff.*

The *cause of action* must be proved as in ordinary cases: as to evidence in ejectment by, see *ante*, 460-1.

The plt.'s *character* of executor or administrator must be proved, except where it is admitted by the deft.'s plea, as by *non-assumpsit* to an action on promises to the intestate, when the production of the letters of administration cannot be insisted on, even though they be not properly stamped, *Thynne v. Protheroe*, 2 *M. & S.* 553; nor, after such plea, will the deft. be allowed to show that the supposed intestate has made a will, *Marsfield v. Marsh*, 2 *Ld. Raym.* 824; and the plea of *non est factum* on a bond to the intestate admits plt.'s title as administrator: *Gidley v. Williams*, 1 *Salk.* 38; *Com. D. Pleader*, 2 *D.* 10. This admission only arises, however, where the title of the executor or administrator is sufficiently stated, as the plea merely admits the title as alleged: *Adams v. Savage*, 6 *Mod.* 134. The plea of the general issue will not be an admission of the title of the executor, if the cause of action have accrued subsequently to the letters of administration being granted, as in trover, on the possession of the testator, and conversion in the time of the plt.: *Hunt v. Stephens*, 3 *Taunt.* 113; see, however, *Watson v. King*, 2 *Camp.* 272. In such case, strict proof of title will be necessary, *Marsfield v. Marsh*, 2 *Ld. Raym.* 824, except where the executor has actual possession of the goods, which alone is *prima facie* evidence of property: *Blackham's case*, 1 *Salk.* 290; *Basset v. Maynard*, *Cro. E.* 819; 2 *Saund.* 47. If the executor sue in his own right, no proof of his being executor need be adduced, *Com. D. Pleader*, 2 *D.* 1, *Homsay v. Dimmocke*, *Vent.* 119, *Wallis v. Lewis*, 2 *Ld. Raym.* 1215; the naming himself as executor, when he sues in his own right, will be surplusage, *Com. D. Pleader*, 2 *D.* 1; though, if the action be in his own name, but he claim in his representative character, he must adduce proof of his title: *Marsfield v. Marsh*, 2 *Ld. Raym.* 824.

The plt.'s character of executor may be proved by the probate of the will nominating him executor: *Coe v. Westernham*, 2 *Selw. N. P.* 730. An examined copy of the probate will be evidence that the party therein named is executor: *Hoe v. Nelthorpe*, 3 *Salk.* 154; 1 *Ld. Raym.* 154, *s.c.*; *R. v. Staines*, *Skin.* 584. In the case of the loss of the probate, an exemplification \*under the seal of the court will be [\*504] granted in lieu thereof: *Shepherd v. Shorthose*, 1 *Str.* 412; *ante*, 446.

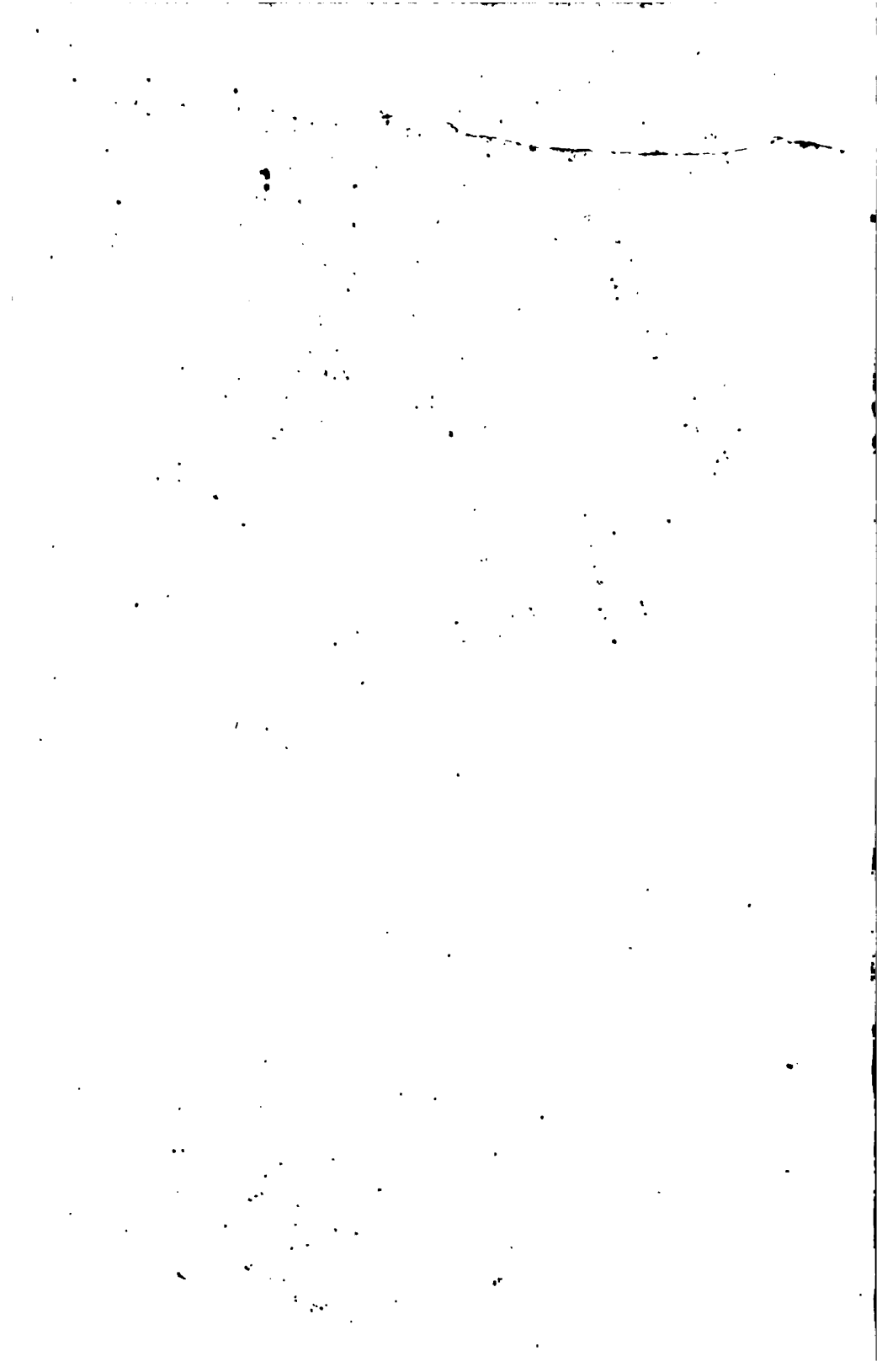
The title of the administrator may be proved by the letters of administration, or by the original book of acts, which directs the grant of the letters with the surrogate's fiat: *Elden v. Kiddell*, 8 *East*, 187;

*Garrett v. Lister*, 1 *Lev.* 25; *B. N. P.* 246; 2 *M. & S.* 567. If, on production of the letters, they appear to be improperly stamped, they will be void, *Hunt v. Stevens*, 2 *Taunt.* 113; or, if they be granted by a bishop, or other inferior judge, not having jurisdiction so to do, *Com. D. Admin. B.* 5; but see *Comber's case*, 9 *P. Wms.* 767, 1 *Saund.* 275, a.; or, if there be no *bona notabilia* within the province of the archbishop granting them, *Shaw v. Staughton*, 2 *Lee.* 86, *Com. D. Admin. B.* 3; but, if the letters of administration be merely voidable, the plt. will not be precluded from recovering, as, where the metropolitan of a province grants the letters of administration, when the *bona notabilia* are within a diocese of that province, the power to grant letters in such case being properly vested in the bishop of such diocese: 3 *Bac. Ab.* 37; *Com. D. Admin. B.* 3. Where an intestate has *bona notabilia* in two dioceses within the same province, neither diocesan has power to grant administration, but it must be done by the metropolitan of the province; though, if they be within one diocese of one province, and another diocese in another province, the case is different: *per curiam*, *Stokes v. Bate*, 5 *B. & C.* 493; *Com. D. Admin. B.* 3. If a man have *bona notabilia* (that is, to the value of £5.) in several dioceses of the same province, there must be a prerogative administration; if in two of Canterbury, and two of York, there must be two prerogative administrations; and if in one diocese of each province, each bishop must grant one: *B. N. P.* 141; *Salk.* 39. Debts on recognizances, statutes, or judgments, are *bona notabilia*, where they are acknowledged or given, *Com. D. Admin. B.* 4; but simple contract debts are such in the province in which the residence of the debtor was when the death of the testator happened: *ib.*, *Yeomans v. Bradshaw*, *Carth.* 373; and specialty debts are such in the province where they were found at the death of the testator: *Com. D. Admin. B.* 4; *Cro. E.* 472. A lease for years is *bona notabilia* where the land is situate: *ib.* Though letters of administration, granted by an inferior judge, have been deemed void, yet, if he grant a probate, it has been considered voidable only: *Comber's case*, 1 *P. Wms.* 767; 1 *Saund.* 275, a.

#### *Competency of Witnesses.*

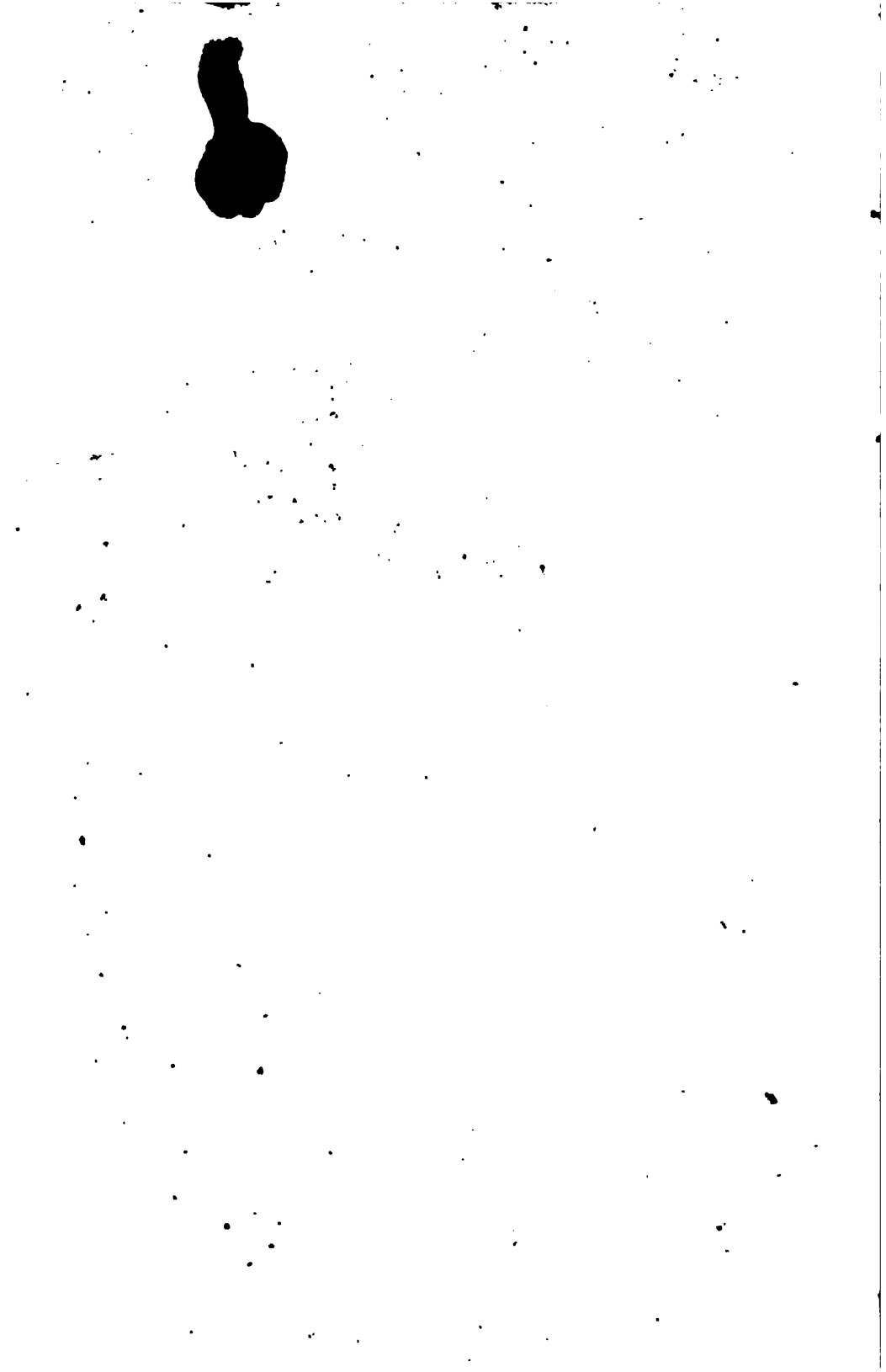
A paid legatee is a competent witness to increase the estate: *Clarke v. Gannon*, *R. & M.* 31. A person having an unsatisfied demand upon the insolvent estate of the testator or intestate, is not a competent witness for the plt. (executor), as he has no means of obtaining any sort of satisfaction for his debt, unless the plt. succeed in the action, when a fund will be created, out of which he may be satisfied: *Craig v. Cundel*, 1 *Camp.* 381. In an action by an executor or administrator, for a debt due to the intestate, a creditor of the intestate is a good witness to prove it: *Paul v. Brown*, 6 *Esp. Rep.* 34. A creditor is a competent witness for an administrator, to prove due administration by payment of a debt to himself: *Stark. Ev.* 776.

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